

Restructuring & Insolvency

Legal framework

Legislation

What is the primary legislation governing insolvency and restructuring proceedings in your jurisdiction?

Romania

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The primary legislation governing insolvency and restructuring proceedings is Law 85/2014 on preventing insolvency and insolvency proceedings.

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Regulatory climate

On an international spectrum, is your jurisdiction more creditor or debtor friendly?

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Although intended to protect the interests of both debtors and creditors, practitioners believe that Law 85/2014 is more creditor friendly. However, this is determined on a case-by-case basis depending on the facts.

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Sector-specific regimes

Do any special regimes apply to corporate insolvencies in specific sectors (eg, insurance, pension funds)?

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Special insolvency regimes are applicable to credit institutions and insurers.

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Reform

Are any reforms to the legal framework envisaged?

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No reforms to Law 85/2014 are envisaged. However, Law 151/2015 on insolvent individuals will enter into force on August 1 2017.

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Director and parent company liability

Liability

Under what circumstances can a director or parent company be held liable for a company's insolvency?

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As a matter of principle, a director or a shareholder may be held liable if he or she has performed one of the following actions which led to the company's insolvency:

- using the company's goods or credits for his or her own benefit or for the benefit of another person;
- engaging in the production, trade or provision of services for his or her personal benefit in the company's name;
- ordering the continuation of an activity that led the company to cease payments for personal benefit;
- keeping a fictitious account, making accounting documents disappear or failing to keep accounts in accordance with the law;
- hijacking or concealing company assets or fictitiously increasing its liabilities;
- using ruinous methods to procure funds for the company in order to delay the cessation of payments;
- in the month preceding the cessation of payments, paying or ordering the payment of a creditor with a preference to the detriment of other creditors; and
- intentionally committing any other act which contributed to the company's insolvency.

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Defences

What defences are available to a liable director or parent company?

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In general, the most efficient defence is to prove that none of the aforementioned actions (which are expressly included in Law 85/2014 on preventing insolvency and insolvency proceedings) have been performed, or that there is no direct link between the director or shareholder's actions and the company becoming insolvent – in other words, to prove that the company's insolvency is due to objective economic reasons beyond the fault of the directors or shareholders.

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Due diligence

What due diligence should be conducted to limit liability?

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The directors and shareholders must take the appropriate actions to limit the company's exposure to the cessation of payments as far as possible. Such actions may also imply the commencement of proceedings (eg, the *ad hoc* mandate or the preventive concordat) intended to reach an agreement with creditors and avoid insolvency.

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Position of creditors

Forms of security

What are the main forms of security over moveable and immoveable property and how are they given legal effect?

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The main forms of security are pledges, moveable and immoveable privileges, moveable and immoveable mortgages and retention rights. Moreover, the Civil Code regulates surety as the main form of personal security.

A secured creditor holding one of these forms of security enjoys certain rights under Law 85/2014, including to:

- be registered as a secured creditor with the table of receivables and thus enjoy a better chance of having its receivable paid;
- request the syndic judge to withdraw the suspension of the enforcement procedure caused by the commencement of insolvency, and consequently to obtain the sale of its security or alternative protection remedies;
- collect interest and accessories for the secured receivable if bankruptcy is opened; and
- receive preferential payments within reorganisation and bankruptcy.

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Ranking of creditors

How are creditors' claims ranked in insolvency proceedings?

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- collect interest and accessories for the secured receivable if bankruptcy is opened; and
- receive preferential payments within reorganisation and bankruptcy.

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Can this ranking be amended in any way?

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No, the aforementioned ranking is provided for by Law 85/2014 and cannot be amended.

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Foreign creditors

What is the status of foreign creditors in filing claims?

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A foreign creditor enjoys the same rights in an insolvency proceeding under Law 85/2014 as a Romanian creditor. The only difference for foreign creditors is a formal one: foreign entities cannot purchase Romanian judicial stamps (which, for filing a request of receivables, amount to Lei200 (€45)), and therefore must appoint a Romanian representative to pay the stamps.

Unsecured creditors

Are any special remedies available to unsecured creditors?

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No specific remedies are available to unsecured creditors.

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Debt recovery

By what legal means can creditors recover unpaid debts (other than through insolvency proceedings)?

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Once the insolvency proceedings have been opened, all common law enforcement procedures against the insolvent debtor are stayed automatically.

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Is trade credit insurance commonly purchased in your jurisdiction?

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This mainly depends on the debtor's line of business – for example, trade credit insurances are used in the IT domain.

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Liquidation procedures

Eligibility

What are the eligibility criteria for initiating liquidation procedures? Are any entities explicitly barred from initiating such procedures?

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The initiation of bankruptcy procedures may occur in the following circumstances:

- The debtor declares its intention to become bankrupt;
- None of the creditors holding at least 20% of the total value of receivables, the judicial administrator or the debtor proposes a reorganisation plan;
- No proposed reorganisation plan is approved by the creditors or confirmed by the syndic judge;
- The payment and distribution programme under the reorganisation plan is not observed;
- The debtor accumulates unpaid receivables during reorganisation; or
- The judicial administrator's proposal to open the bankruptcy is approved by the creditors holding at least two-thirds of the voting creditors.

Only a prosecuted company under the Criminal Code may be barred from filing for bankruptcy.

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What are the primary procedures used to liquidate an insolvent company in your jurisdiction and what are the key features and requirements of each? Are there any structural or regulatory differences between voluntary liquidation and compulsory liquidation?

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The primary procedure is the opening of bankruptcy against the insolvent company, which may occur in any of the cases set out above. The key feature is that the procedure is regulated by Law 85/2014 on preventing insolvency and insolvency proceedings and requires the appointment of a judicial administrator to perform all actions leading to liquidation under the supervision of the creditors and the syndic judge.

Voluntary liquidation requires a decision by the company’s shareholders and may be applied only if all of the company’s debts towards its creditors are paid.

Thus, voluntary liquidation is governed by Law 31/1990 on commercial companies, while compulsory liquidation is regulated by Law 85/2014.

In terms of final legal effects, both procedures are aimed towards the dissolution and liquidation of the company followed by its deregistration with the trade registry.

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How are liquidation procedures formally approved?

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Liquidation following bankruptcy is regulated by Law 85/2014 and is formally approved by a resolution of the syndic judge.

The voluntary liquidation procedure is approved by the shareholders’ meeting.

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What effects do liquidation procedures have on existing contracts?

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Existing contracts are usually terminated at the commencement of the liquidation procedure, since the company preserves legal personality only for the purposes of the liquidation.

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What is the typical timeframe for completion of liquidation procedures?

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It depends on the complexity of the case, but usually ranges between three months (for voluntary liquidation) and several years.

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How is the liquidator appointed and what is the extent of his or her powers and

responsibilities?

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The judicial liquidator is proposed by the debtor or creditor in the request to commence the bankruptcy procedure. The syndic judge approving the commencement of bankruptcy appoints the liquidator (who will be further confirmed by the creditors).

The main responsibilities of the judicial liquidator are:

- examining the debtor's activity and drafting a detailed report on the causes and circumstances leading to insolvency, listing potentially liable persons;
- managing the debtor's activity;
- filing actions for the annulment of any fraudulent acts and operations carried out by the debtor to the detriment of the creditors, as well as patrimonial transfers, commercial transactions and other preferential operations intended to prejudice the rights of creditors;
- applying seals, carrying out an inventory of the assets and taking appropriate measures for their preservation;
- terminating contracts concluded by the debtor;
- verifying claims and, where appropriate, making objections to them, notifying creditors in the event of partial or full rejection of claims and drafting the table of creditors;
- monitoring the collection of debts from the bankrupt company's debtors resulting from the transfer of goods or funds carried out before the opening of the procedure, cashing receivables and filing actions for the recovery of the debtor's debts;
- cashing payments on behalf of the debtor and transferring them to the debtor's account;
- conducting the sale of the debtor's assets;
- concluding transactions, discharging of debts and waving the fiduciary and real guarantees subject to confirmation by the syndic judge;
- referring to the syndic judge any matter that requires confirmation; and
- carrying out any other attributions established by the syndic judge.

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Court involvement

What is the extent of the court's involvement in liquidation procedures?

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The syndic judge must examine and ensure that the legal provisions are fully observed. However, the managerial prerogatives belong to the liquidator and creditors.

The main prerogatives of the syndic judge within the bankruptcy procedure are:

- rendering the decision for the commencement of bankruptcy;
- settling any challenge filed by the debtor against the creditors' request to open the bankruptcy procedure;
- settling any challenge filed by the creditors against the debtor's request to open the bankruptcy procedure;
- appointing the liquidator;
- confirming the liquidator after he or she has been approved by creditors holding more than 50% of the values of receivables;
- replacing the liquidator for valid reasons;
- lifting the debtor's right to manage its activity;
- settling any request to trigger the liability of members of the management body who contributed to the insolvency of the debtor;
- settling actions filed by the judicial liquidator in order to annul fraudulent acts, operations and payments performed by the debtor after the commencement of the bankruptcy procedure;
- settling any challenge filed by the debtor or the creditors' assembly against the measures taken by the judicial liquidator;
- settling a request submitted by the judicial liquidator to cease the reorganisation of the debtor and open the bankruptcy procedure;
- settling challenges filed against the judicial liquidator's activity reports;
- settling challenges filed against decisions of the creditors' assembly; and
- rendering the decision to close the bankruptcy procedure.

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Creditor involvement

What is the extent of creditors' involvement in liquidation procedures and what actions are they prohibited from taking against the insolvent company in the course of the proceedings?

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In principle, the creditors (via the creditors' meeting) and the creditors' committee are involved in the adoption of any management decision affecting the company's activity.

The creditors have the following main prerogatives under the liquidation procedure:

- to approve the terms and conditions of the sale of the debtor's assets;
- to approve the appointment of specialised valuers or service providers, if necessary, in order to maximise the debtor's estate and protect its assets;
- to take note of the activity reports prepared by the liquidator and, if necessary, to challenge them; and
- to submit actions for the annulment of fraudulent acts or operations made by the debtor when such actions have not been filed by the judicial liquidator.

As of the date of opening the insolvency procedure, all enforcement procedures against the debtor or its assets are stayed automatically, and therefore any claim for the payment of the receivables outside the liquidation procedure is prohibited.

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Director and shareholder involvement

What is the extent of directors' and shareholders' involvement in liquidation procedures?

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Once the special administrator has been appointed by the shareholders (to protect their and the company's interests), the prerogatives of the shareholders' assembly and the board directors cease automatically. Notwithstanding, the company executives are still involved in the company's business, but under the management and supervision of the judicial administrator.

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Restructuring procedures

Eligibility

What are the eligibility criteria for initiating restructuring procedures? Are any entities explicitly barred from initiating such procedures?

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There are no eligibility criteria *per se*, except that the reorganisation plan must be economically viable, in accordance with Law 85/2014 on preventing insolvency and insolvency proceedings, and must be approved by the creditors voting on categories.

A debtor which has been subject to an insolvency procedure in the past five years or a debtor which, directly or through its shareholders and directors, was prosecuted by the court for certain criminal offences (eg, tax evasion, fraud, corruption or bribery) cannot propose a reorganisation plan.

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Procedures

What are the primary formal restructuring procedures available in your jurisdiction and what

are the key features and requirements of each?

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The primary restructuring procedure is the opening of the insolvency proceedings with the aim of proposing a reorganisation plan.

Less often used are the procedures to prevent insolvency such as the *ad hoc* mandate and the preventive concordat.

The reorganisation plan under the insolvency procedure may provide for:

- the restructuring of the company and the continuation of the debtor's current activity;
- the liquidation of some of its assets; or
- a combination of the two.

The key point is to have the reorganisation plan approved by the creditors and confirmed by the syndic judge.

The reorganisation plan must include a payment schedule and cannot last for more than three years, plus a possible extension of one year (if applicable) calculated from the date of confirmation of the plan by the syndic judge.

The insolvency prevention procedures aim to restructure the company through a conventional restructuring of debts subject to negotiations with creditors, while the debtor's protection against potential enforcement procedures from the non-adherent creditors is less effective. For this reason, most debtors prefer to open insolvency proceedings and propose a reorganisation plan thereunder to fully benefit from the protection against enforcement.

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How are restructuring plans formally approved?

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The reorganisation plan is approved by the creditors voting by categories and is subject to confirmation by the syndic judge.

If a reorganisation plan is voted by the creditors as detailed below and the conditions set out by the law are fulfilled, its confirmation by the syndic judge is a formality.

Every category of creditors votes separately, as follows:

- receivables with preference rights (secured claims);
- salary claims;
- budget receivables;
- indispensable claims (receivables belonging to essential suppliers); and
- other unsecured claims.

A reorganisation plan will be considered to be accepted by a category of receivables if, within that category, the plan is accepted by an absolute majority of the value of the claims.

There are several algorithms for calculating the votes depending on the number of categories. The common feature of all such algorithms is that at least 30% of the total value of receivables must approve the plan.

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What effects do restructuring procedures have on existing contracts?

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Ongoing contracts are considered to be maintained as on the date of commencement of the insolvency procedure. Any contractual clauses providing for termination of the ongoing contracts, waving the benefit of the maturity or acceleration based on the opening of the procedure are null and void.

In order to maximise the debtor's assets, within three months from the date of opening the insolvency proceedings, the judicial administrator or liquidator may terminate any contract (eg, unexpired leases or other long-term contracts) if not fully or substantially performed by the parties.

To the same end, the judicial administrator may assign the ongoing contracts to third parties if not concluded *intuitu personae*.

The specific legal effects of potential unilateral termination by the judicial administrator are set out in Law 85/2014 with

respect to certain contracts (eg, financial leasing agreements).

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What is the typical timeframe for completion of restructuring procedures?

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The duration of the reorganisation plan is three years, with a possible one-year extension. However, in practice there have been cases where this timeframe has been far exceeded.

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Court involvement

What is the extent of the court's involvement in restructuring procedures?

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The syndic judge is required to confirm the reorganisation plan approved by the creditors's assembly. To this purpose, the syndic judge verifies the compliance of the reorganisation plan and voting thereon with Law 85/2014. The syndic judge may also request the opinion of an expert on the feasibility of the reorganisation plan and its chances for a successful implementation.

Once a reorganisation plan is approved, the syndic judge monitors its implementation by reviewing the periodical reports submitted by the judicial administrators. In addition, the syndic judge is also required to rule on any challenges, claims or objections of any nature filed by the creditors with respect to the implementation of the reorganisation plan.

At the end of the reorganisation period, if all receivables are paid as per the distribution schedule, the court renders a decision for the closing of the insolvency procedure against the debtor.

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Creditor involvement

What is the extent of creditors' involvement in restructuring procedures and what actions are they prohibited from taking against the company in the course of the proceedings?

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The creditors have the following main prerogatives under the restructuring procedure:

- to analyse the debtor's status and make recommendations to the creditors assembly with respect to the continuation of ongoing activities and the reorganisation plan;
- to take note of the activity reports prepared by the judicial administrator, analyse them and, if necessary, challenge them;
- to prepare reports in order to be presented to the creditors assembly on the measures taken by the judicial administrator and their effects and to propose remedial actions;
- to request the lifting of the debtor' right of administration;
- to submit actions for the annulment of fraudulent acts or operations made by the debtor if not filed by the judicial administrator;
- to propose a reorganisation plan if holding at least 20% of the value of the receivables; and
- to vote on the reorganisation plan.

The creditors cannot request the payment of debts outside the restructuring procedure since all such enforcement procedures are stayed as of right.

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Under what conditions may dissenting creditors be crammed down?

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Decisions are taken by a simple majority within each category voting on the plan, and therefore dissenting creditors must obey the decisions of the majority. However, a dissenting creditor may object to the syndic judge provided that it may be argued that the plan does not comply with the legal provisions.

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Director and shareholder involvement

What is the extent of directors' and shareholders' involvement in restructuring procedures?

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There is no such formal involvement *per se*. Moreover, affiliated parties are not generally allowed to vote on the reorganisation plan. Notwithstanding, the directors and the shareholders' practical involvement is essential since they know their business best and can draft a sustainable reorganisation plan.

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Informal work-outs

Are informal work-outs available for distressed companies in your jurisdiction? If so, what are the advantages and disadvantages in comparison to formal proceedings?

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No informal work-outs are available.

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Transaction avoidance

Setting aside transactions

What rules and procedures govern the setting aside of an insolvent company's transactions? Who can challenge eligible transactions?

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As a matter of principle, eligible transactions can be challenged by the judicial administrator or liquidator, or by the creditors if the relevant claims are not filed by the judicial administrator or liquidator.

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Operating during insolvency

Criteria

Under what circumstances can a company continue to conduct business during an insolvency procedure?

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Except for limited cases where the right to self-administration is lifted, an insolvent company continues to conduct its business under the management of the special administrator (appointed by the shareholders) and supervision of the judicial administrator.

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Stakeholder and court involvement

To what extent are relevant stakeholders (eg, creditors, directors, shareholders) and the courts involved in any business conducted during an insolvency procedure?

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The directors and shareholders are involved *de facto* since they continue to run the business, but under the supervision of the judicial administrator. The creditors take over making managerial decisions and the court's role is limited to enforcement of the applicable legal provisions.

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Financing

Can an insolvent company obtain further credit or take out additional secured loans during an insolvency procedure?

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Finance granted to the debtor during the observation period or under the reorganisation plan must be approved by the creditors' assembly. However, in practice such new financing is rather limited since, as a matter of principle, there are no securities available to guarantee the injection of new money.

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Employees

Effect of insolvency on employees

How does a company's insolvency affect employees and the company's legal obligations to employees?

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Employees holding receivables due before the commencement of the insolvency procedure are automatically registered with the table of creditors.

The employees' receivables enjoy priority after secured receivables in case of bankruptcy.

Employees may be collectively dismissed without the observance of the formalities for collective dismissal, but must receive redundancy payments according to the collective labour agreement and the legislation in force.

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Cross-border insolvency

Recognition of foreign proceedings

Under what circumstances will the courts in your jurisdiction recognise the validity of foreign insolvency proceedings?

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Foreign insolvency proceedings are generally recognised in Romania subject to the fulfilment of certain formalities and submission of the relevant documents. The enforcement of a foreign insolvency procedure may be rejected by the Romanian courts if the foreign procedure:

- is the result of fraud; or
- breaches certain norms of public order under Romanian private international law.

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Winding up foreign companies

What is the extent of the courts' powers to order the winding up of foreign companies doing business in your jurisdiction?

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The Romanian courts have the prerogative to open and oversee the Romanian insolvency procedure of a foreign company that is doing business in Romania through a subsidiary (without legal personality but registered in Romania for fiscal purposes).

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Centre of main interests

How is the centre of main interests determined in your jurisdiction?

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The European Court of Justice (ECJ) has given new guidance on the strength of the registered office, the presumption of the centre of main interests and the meaning of 'establishment' for the purpose of the EU Insolvency Regulation.

The centre of main interests must be interpreted in a uniform way by EU member states and by reference to EU law rather than national law, as follows:

- If a debtor's registered office is moved before the request to open insolvency proceedings is filed, the debtor's centre of main interests is presumed to be the place of its new registered office. The ECJ has stated that the centre of main interest is established by looking to the last location of the debtor's registered office.
- A debtor's centre of main interests must be determined by attaching greater importance to the place of the company's central administration, as may be established by objective factors which are ascertainable by third parties (eg, the presence of assets belonging to the debtor and the existence of contracts for financial exploitation of those assets in an EU member state other than that in which the registered office is situated).
- Factors to be taken into account when analysing whether the registered office presumption has been rebutted include all places where the debtor company pursues economic activities and all those in which it holds assets, insofar as those places are ascertainable by third parties.
- The requirement that the factors used to rebut the registered office presumption must be objectively ascertainable by third parties may be considered to be met where the material factors have been made public, or at the very least, made sufficiently accessible to enable third parties (in particular, the company's creditors) to be aware of them.

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Cross-border cooperation

What is the general approach of the courts in your jurisdiction to cooperating with foreign courts in managing cross-border insolvencies?

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The Romanian courts will generally cooperate with foreign courts and representatives. The courts are also empowered to communicate directly or request information or assistance from foreign courts or representatives.

Cooperation may be implemented by any means appropriate, such as:

- designating a person or entity acting under the instructions of the court;
- communicating information by any means considered appropriate by the court;
- coordinating the administration and supervision of the debtor's assets and activity;
- approving or implementing courts' coordination arrangements; and
- coordinating simultaneous insolvency proceedings regarding the same debtor.

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Law stated date

Correct as of

Please state the date of which the law stated here is accurate.

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The answers are based on Law 85/2014 on preventing insolvency and insolvency proceedings, which is accurate as of June 19 2017.

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