Insolvency

LEGISLATION

1. What are the main regulations regarding insolvency and liquidation in Romania?

Different insolvency legal frameworks are in place for companies, financial institutions and public administrative bodies. Law No. 85/2006 regarding insolvency procedures regulates the insolvency and liquidation of companies and other legal entities that perform commercial activities; Government Emergency Ordinance No. 10/2004 (GEO 10/2004) applies for the bankruptcy of financial institutions, while Government Emergency Ordinance No. 46/2013 (GEO 46/2013) governs the insolvency of public administrative units. In April 2014, the Romanian Parliament passed the law regarding the prevention of insolvency and insolvency procedure (the 2014 Insolvency Law).

The 2014 Insolvency Law regulates the ad-hoc and concordat procedures, the insolvency procedure for legal entities, the cross-border insolvency and the insolvency of groups of companies as well as the bankruptcy procedure for financial institutions and insurance companies.

For ongoing procedures at the time the 2014 Insolvency Law was passed, Law No. 85/2006 will continue to be applied. In the matter of voluntary liquidation, the Companies Law No. 31/1990 provides the legal framework for the liquidation of companies that are not insolvent. In companies under voluntary liquidation that are found insolvent the liquidator must apply for the commencement of insolvency procedures.

Although a law regulating the insolvency of individuals has been adopted in Romania, its applicability is still limited. In order to improve the business environment and the competitive environment, in October 2018 the Romanian Government adopted the Emergency Ordinance No. 88/2018 (GEO 88/2018), which amended and supplemented Law No. 85/2014 regarding the prevention of insolvency and insolvency procedure.

2. Is there a pre-insolvency legal framework in Romania?

Starting 2009, legal rules regarding the concordat and ad-hoc mandates apply in Romania as a pre-insolvency legal framework. Nevertheless, pre-insolvency measures are not mandatory. Companies undergoing negotiations for a concordat or operating under an ad-hoc mandate that become insolvent must apply for insolvency within five days after the failure of the negotiations.

The 2014 Insolvency Law follows the same principles as Law No. 85/2006, differing mainly in that, under the 2014 Insolvency Law, the concordat project must be approved by 75% of the creditors table instead of ⅔ as per Law No. 85/2006.

Nevertheless, the concordat and ad-hoc procedures are not popular, the practice is limited and success rate remains unknown.

3. What is the definition of insolvency in Romania?

Law No. 85/2014 defines insolvency as the situation in which the company's available funds are not covering its due debts, as follows:

- Insolvency is self-evident where the debtor is not able to pay a debt within 90 days from the due date;
- Insolvency is imminent whenever the debtor proves unable to pay a debt from the funds available on the due date.

The law also sets forth a limit for the creditors' claims able to result in the debtor's insolvency at RON 50.000 (approximately EUR 10,000 or USD 12,000).

GEO 88/2018 amends and supplements Law No. 85/2014 as regards State budget claims, to the effect that, where the application for commencing the insolvency procedure is submitted by the debtor, the amount of State budget claims must be less than 50% of the debtor's total claims.

4. Are there any grounds on which a debtor may qualify directly for liquidation?

The 2014 Insolvency Law provides that the debtor applying for its own insolvency may choose the simplified procedure, proceeding directly to liquidation.

When the application is made by a creditor, the debtor may qualify directly for

liquidation in the following situations:

- Where the debtor does not own any assets;
- Where the debtor's documents including the accounting documents cannot be found;
- Where the debtor's administrator cannot be contacted;
- Where the debtor's official address does not exist or is not the same as the address submitted to the Trade Registry.

5. Which are the main stages of the general insolvency procedure?

The 2014 Insolvency Law provides that there are three main stages that can occur during the insolvency procedure:

- The observation period, lasting from the date the procedure is opened, up to the date a reorganisation plan is approved or the liquidation procedure begins;
- The reorganisation period, beginning after the approval of the reorganisation plan and lasting until the plan is fully implemented or a liquidation procedure begins;
- The liquidation procedure, which lasts until the complete foreclosure of the company.

PARTIES IN INSOLVENCY/LIQUIDATION

1. Who can be appointed as judicial administrator or liquidator?

The 2014 Insolvency Law provides that the judicial administrator and the liquidator can be individuals or specialised companies, members of the Romanian National Union of Insolvency Practitioners (UNPIR) authorised in accordance with Government Emergency Ordinance No. 86/2006.

The syndic judge appoints the judicial administrator or liquidator as nominated by the applicant, or, in the absence of a nomination, the designation will be made from among the members of the Romanian National Union of Insolvency Practitioners (UNPIR) that submitted their application to the case-file.

If no application is submitted, the designation will be made by randomly appointing a practitioner from the UNPIR list.

The 2014 Insolvency Law includes special rules for the insolvency of groups of companies, namely:

- All insolvency cases will be settled by one court for all companies in the group;
- The competent court will be the court having jurisdiction over the mother company or the company among the group with the highest annual turnover;
- For each company a separate insolvency case file will be opened, to be transferred to the syndic judge designated for the first insolvency that was opened;
- The same insolvency practitioner will be appointed for all insolvency cases of the group.

The syndic judge, upon the request of any interested party, supervises observance of all these rules.

2. What are the main responsibilities of the judicial administrator or liquidator?

The judicial administrator's main responsibilities are (i) to supervise, or take over the debtor's administration as the syndic judge decides; (ii) to prepare the required reports, i.e. the report on the causes and conditions of the insolvency, the activity reports and any other reports requested by the syndic judge; (iii) to collect the receivables and to sell assets as permitted by the law. The judicial administrator must analyse all creditors' claims in the beginning of the procedure and create the creditors' table.

As per the 2014 Insolvency Law, supervision means that the debtor may perform the following operations only subject to the judicial administrator's prior approval:

- All payments, both from the bank account or cash;
- Contract signing or amendments;
- Legal documents related to litigation cases, approval of all measures related to collection of receivables, whether amicable or under legal enforcement procedures;
- Operations resulting in decrease in the estate value, new valuation or cassation of fixed assets;
- Transactions proposed by the debtor;
- Financial reports and activity reports;
- Restructuring measures or changes in the collective bargaining agreement;
- Mandates for the general creditors assembly or creditors committee where the debtor is part of the procedure and for all the shareholders meetings where the debtor is a shareholder.

GEO 88/2018 amends and supplements Law No. 85/2014 as regards the activity

reports that are provided by the judicial administrator or liquidator, so that the report will include information on surveillance of the operations performed on the basis of the preliminary approval and, also, information on tax compliance.

The liquidator takes full control over the debtor's administration and their assets.

3. What are the attributions and powers of the syndic judge?

The syndic judge decides the opening of the insolvency procedure. At the same time, the syndic judge appoints the judicial administrator or the liquidator and confirms their fees. During the procedure, the syndic judge monitors the judicial administrator's/ liquidator's activity by way of their activity reports. It is also for the syndic judge to decide on all the challenges the debtor or its creditors promote during the procedure in connection to the judicial administrator's/liquidator's activity reports, transaction annulments, the administrators' liability, the confirmation or rejection of the reorganisation plan.

THE DEBTOR'S REORGANISATION

1. Who is entitled to propose a reorganisation plan?

The following categories are entitled to submit a reorganisation plan:

- The debtor, after approval by its General Assembly of Shareholders;
- The judicial administrator;
- One or several creditors representing at least 20% of the claims registered in the creditors' table.

The general deadline for submitting the reorganisation plan is 30 days after the final creditors' table has been published.

2. Which are the main mandatory provisions of a reorganisation plan and the conditions for its admissibility?

The reorganisation plan must set forth the grounds of the proposed reorganisation, from both an operational and financial perspective, as well as the financing sources for the reorganisation and all the measures to be taken to accomplish the plan.

The duration of the proposed reorganisation plan cannot exceed three years and may only be extended by one year at the request of the judicial administrator and submitted within the first 18 months of execution.

An important element of the plan is the proposed schedule of payment to the creditors, indicating the financing sources, the treatment of claims and a comparative analysis between the number of claims that would be covered by liquidation (in percentage) versus the coverage proposed within the reorganisation plan. In addition, the 2014 Insolvency Law requests that a reorganisation plan must provide for the payment schedule for the debts arisen after the insolvency procedure was opened but before the approval of the plan. Particularly, if the reorganisation plan fails, the claims registered on the final creditors table will be restored. Specifically, all debts are reset to the values stated in the final creditors table out of which the amounts paid under the reorganisation plan will be deducted.

As regards the conversion of State budget claims into securities, GEO 88/2018 amends and supplements Law No. 85/2014 to the effect that, provided that the budgetary creditor consented by vote and only where the conditions expressly provided by the law are fulfilled, the reorganisation plan may provide for the conversion of State budget claims into shares.

So far, the tax authorities typically did not approve reorganisation plans providing for rescheduling, reductions or cancellations of debts owed to the State budget because such allowances would be considered State aid for the debtor. Despite the fact that the 2014 Insolvency Law provides that any such measures regarding budgetary debts proposed in the reorganisation plan do not constitute State aid for the debtor if the creditor collects under a reorganisation plan more than it would collect through bankruptcy, the general practice of the tax authorities is to reject the reorganisation plans that provide for either a claim reduction or rescheduling.

GEO 88/2018 supplements Law No. 85/2014 by establishing the criteria that the budgetary creditor may consider when voting on the reorganisation plan which proposes to reduce the unsecured budgetary claim.

3. Who is approving the reorganisation plan?

According to the law, the reorganisation plan is approved by the General Assembly of the Creditors with the simple majority of the categories of creditors. Under the law, a few categories of creditors are recognised for the purposes of voting:

- Secured creditors: creditors whose claims against the debtor are secured by assets

under the debtor's ownership;
- Salary receivables: the debtor's employees' claims for unpaid salaries;
- Tax claims: claims against the debtor representing taxes;
- Unsecured creditors: creditors whose claims against the debtor are not secured.

Provided that the debtor declares it from the onset of the procedure, an additional category of indispensable creditors is possible, consisting of those creditors that supply goods and/or services that are mandatory for the debtor to operate normally and cannot be replaced under the same financial conditions. The list is subject to confirmation by the judicial administrator and may be challenged by any creditor. Only one reorganisation plan may be approved. The decision of the General Assembly of Creditors approving/rejecting the reorganisation plan is submitted to the syndic judge for analysis and confirmation by the judicial administrator. Besides the simple majority of the creditors' category, creditors representing at least 30% of the total value of debts on the final creditors table must also approve the plan.

4. Is it possible to amend the confirmed reorganisation plan during the procedure?

The reorganisation plan may be amended at any point in time throughout the procedure, provided that the General Assembly of the Creditors approves and the syndic judge confirms the amendments.

5. Who is responsible for compliance with the reorganisation plan?

Once a reorganisation plan is confirmed, the debtor will manage its activities under the supervision of the judicial administrator. The special administrator, who is the representative of the debtor's shareholders in the insolvency procedure, will submit a quarterly report to the Creditors' Committee detailing how the reorganisation plan is implemented. After the Creditors' Committee takes its decision, a copy of the report must also be filed with the court.

LIQUIDATION

1. What are the first steps of the liquidation procedure?

Prior to liquidation, the liquidator will take over the debtor's assets and archive. All

ongoing contracts are terminated, including the labour contracts. Once the debtor's assets are inventoried and evaluated, the liquidator will proceed under the supervision of the judge to sell all the assets identified. The liquidating debtor's assets may be sold by auction or by direct negotiation with a prospective buyer.

2. How are the funds obtained from liquidation distributed?

The funds obtained from liquidation will first cover the procedure costs, including the liquidator's fee, followed by salary claims, tax claims and creditors' claims in accordance with their rank. If funds are obtained from selling assets securing the claims of one creditor, all such funds, after covering the costs of the procedure, will be distributed to the respective creditor to the satisfaction of its claim. The remaining amount, if any, will follow the regular distribution criteria. Among creditors with the same rank, funds will be distributed on a pro-rata basis, in accordance with the weight of each claim in the creditors table.

PROCEDURE CLOSING AND ADMINISTRATOR LIABILITY

1. Under what conditions may the debtor's administrator be held liable for the insolvency?

The liability of the debtor's administrator can be triggered if the administrator used the debtor's assets for his own benefit, or performed commercial transactions of his own while ostensibly working for the debtor, or continued the debtor's activity that led to insolvency, or used ruinous means to procure funds in order to delay the insolvency, or is liable for double-bookkeeping or fraudulent transactions. Under the 2014 Insolvency Law, the debtor is presumed in default if it fails to provide the judicial administrator/ liquidator with the required accounting documentation while the causality between such fault and liability is also presumed. The presumption is however relative, as it can be overturned by making available the documents required by law. Besides being directly liable to cover the debtor's debts, the person found liable is banned from being nominated as administrator of any company for the following 10 years after the court decision is final.

2. Who can apply for the administrator's liability?

The judicial administrator/liquidator can claim the administrator's liability from the beginning of the procedure, following the presentation of the report regarding the

causes and conditions of the debtor's insolvency. Failing that, the president of the Creditors' Committee, based on the decision of the General Assembly of Creditors, as well as a creditor owing more than 30% of the amount of debts on the creditors table, may file such claim during the procedure.

3. When can the insolvency procedure be closed and to what effect?

If all claims are paid, the insolvency procedure can be closed at any time. The effect is that the debtor is reinstated in the business environment as a fully operational and functional entity.

4. When can the liquidation procedure be closed and to what effect?

At any moment throughout the procedure, if the debtor has no funds or assets and the creditors do not agree to cover the procedural costs, the syndic judge may decide to close the liquidation procedure and delete the debtor from the Trade Registry records. The syndic judge also decides to close the procedure once all claims are paid through distribution, to the same effect of having the debtor deleted from Trade Registry records. The remaining goods, if any, are transferred to the debtor's shareholders if they apply for such transfer; lacking the shareholders' application, the sale of assets continues and the resulted funds are collected in an account at the disposal of the debtor's shareholders.