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The International Comparative Legal Guide to:

Corporate Recovery & Insolvency 2009

A practical insight to cross-border Corporate Recovery & Insolvency

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Chapter 34

Romania

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1 Issues Arising When a Company is in Financial Difficulties

1.1 How does a creditor take security over assets in Romania?

The Romanian law provides the right of creditors to secure their claims against debtors, by conclusion of securities agreements. Therefore, creditors are entitled to execute mortgage agreements, pledge agreements as well as security agreements regarding other rights *in rem*. Mortgage agreements require notarisation by a notary public in order to be valid and the registration with the competent Real Estate Register for the purpose of its enforceability towards third parties. Furthermore, the object of the pledge agreements can reside in movable tangible or intangible assets. The pledge agreements become legally binding upon signing by all parties. In order to be enforceable, pledge agreements as well as all other rights *in rem* are to be registered with the Electronic Archive for Security in Real Property.

1.2 In what circumstances might transactions entered into whilst the company is in financial difficulties be vulnerable to attack?

According to Law No. 85/2006 regarding the insolvency procedures (the "**Insolvency Law**"), the judicial administrator or the liquidator is entitled to file with the syndic judge cancellation actions pertaining to deeds concluded by the debtor against the interest of its creditors within three years before the opening of the insolvency procedures. In this regard, the judicial administrator or the liquidator may demand cancellation of deeds regarding the establishment or the transfer of patrimonial rights in favour of third parties. Provided that the syndic judge rules for cancellation of such transactions, the third parties shall return the transferred assets or the amount representing the value of the performed services. Nevertheless, the Insolvency Law limits the deeds that can be challenged as mentioned above to operations that are basically detrimental to the Company's patrimony, such as:

- free transfers of property, during a three-year period prior to opening of insolvency procedures whereas humanitarian sponsorships are excluded;
- transactions performed during a three-year period prior to opening of insolvency procedures in which the value of the services performed by the debtor exceeds the received benefit;
- agreements concluded during the three-year period prior to the opening of procedures with the intention of all parties involved to circumvent assets from the pursuit of creditors of the debtor or to affect the creditors' rights in any manner whatsoever; and
- transactions involving transfer of ownership for the payment of a previous debt, performed during a 120-day period prior to Opening of Proceedings, if the amount the creditor would obtain in case of winding-up of the Local Company would be lower than the value of the ownership transfer, etc.

Furthermore, transactions performed with a holder of at least 20% of the share capital of the debtor, with a director of the debtor, with an affiliate company, or with a co-owner of an asset shall be revoked. After the restitution of the asset or the value of the asset by the third party to the debtor, the third party, acting in good faith, shall have a corresponding claim against the patrimony of the debtor.

1.3 What are the liabilities of directors (in particular civil, criminal or disqualification) for continuing to trade whilst a company is in financial difficulties in Romania?

In this regard, upon request of the judicial administrator/the liquidator, the syndic judge may rule that the supervising or the managing bodies of the company (including the director), may be held liable for a part of the debtor's liabilities if such persons: **(i)** have used the assets or the credits of the company for their own use or for the use of a third party; **(ii)** have performed commercial acts in their own interest, under the cover of the company; **(iii)** have decided, for their own interest, the continuation of an activity which obviously led the company to payment cessation; **(iv)** have caused unlawful keeping of the accountancy; **(v)** have unlawfully taken or concealed a part of the company's assets or have fictively increased its liabilities; **(vi)** have used unsuitable means in order to obtain funds in order to delay the payment cessation; or **(vii)** have performed preferential payments to a certain debtor in the last month prior to the payment cessation. Joint liability may be held in case several persons performed such actions, provided that the cause of insolvency occurred prior or during the exercise of their duties. Furthermore, criminal liability may be engaged against the director, provided that it refuses to remit to the syndic judge the documents necessary for the course of the insolvency procedures or does not initiate the insolvency procedures within the mandatory terms provided by the Insolvency Law.

2 Formal Procedures

2.1 What are the main types of formal procedures available for companies in financial difficulties in Romania?

The Insolvency Law provides: **(i)** a common insolvency procedure; and **(ii)** a simplified insolvency procedure. Under the common

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insolvency procedure, the debtor, provided that a 60-day surveillance period is observed, enters successively in both judicial reorganisation and in bankruptcy procedures or either of the judicial reorganisation or bankruptcy procedure. In order to facilitate the dissolution of certain legal entities, if insolvent, the Insolvency Law provides for a simplified procedure. Such procedure allows certain debtors to go bankrupt simultaneously with the opening of the insolvency procedure. Such is applicable only to the insolvent debtor listed hereunder:

- individual merchants;
- family associations;
- companies, provided that: **(i)** their patrimony comprises no assets; **(ii)** their constitutive or financial documents or the director cannot be found; and **(iii)** the premises cease to exist or to correspond to the address registered with the Trade Registry;
- companies which failed to provide in due time: **(i)** the complete list of their assets, including bank accounts; **(ii)** a list comprising details from public registers regarding secured assets; **(iii)** the list of creditors comprising the due amount and the preferred claims; and **(iv)** the list of current activities to continue during the surveillance period;
- companies liquidated prior to application of the insolvency procedure; and
- debtors demanding to be subjected directly to the bankruptcy procedure or debtors not entitled to a judicial reorganisation procedure.

The judicial reorganisation applies to a debtor for the purpose of ensuring the payment of the debtor's debts, according to a plan. Therefore the reorganisation procedure implies the approval, implementation and compliance with a reorganisation plan. The reorganisation plan may individually or separately refer to the: **(i)** operational and/or financial restructuring of the debtor; **(ii)** the corporate restructuring by way of changing the share capital structure of the debtor; or **(iii)** the decrease of the activity of the debtor by liquidation of assets included in the debtor's patrimony. In case of non-compliance with the reorganisation plan, the judicial administrator, the creditor's committee, a creditor, or the special administrator appointed within the reorganisation procedure, may apply with the syndic judge for the opening of the bankruptcy procedure. Bankruptcy is defined as the procedure to which a debtor is subject for liquidation of its patrimony and payment of its debts. Such liquidation is followed by the deletion of the debtor from the relevant register where it is recorded.

2.2 What are the tests for insolvency in Romania?

According to the Insolvency Law, insolvency represents the condition of a debtor's patrimony, characterised by insufficient funds to pay due debts. Such condition is presumed if several debts were not paid in 30 days as of the due date. Insolvency is "imminent" if proof is provided that the debtor will not be able to pay its debts upon their due date. Moreover, a creditor is entitled to file an insolvency petition, in case that the value of its claim amounts to RON 10,000 (approximately EUR 3,000), save for the claims arising from labour relationships which have to meet the threshold of at least six average salaries per national economy.

2.3 On what grounds can the company be placed into each procedure?

According to the Insolvency Law, companies will be placed under insolvency procedures on grounds of the petitions filed with the competent Court by the debtor itself, by creditors or by any other persons or institutions, as determined by law, within 30 days from the date of occurrence of the debtor's insolvency. Moreover, in case of pending insolvency, debtors may also request commencement of the insolvency procedure. The petitions regarding the opening of insolvency procedures shall be signed by the person empowered to represent the company, based on the corporate statutes of the debtor. In the case of entities controlled and monitored by the National Securities Commission, such public institution is entitled to request commencement of the insolvency procedure for such companies.

Furthermore, documents related to the patrimony of the debtor, its balance sheet, the debtor's creditors, the current activities performed by the debtor, etc., shall be deposited with the Court as annexes to the insolvency petition. In case of non-delivery of all the aforementioned within 10 days from the filing of the insolvency petition with the competent Court, the syndic judge shall render a decision regarding the opening of a simplified insolvency procedure.

The debtor shall bear patrimonial liability for the premature filing of insolvency petitions. The debtors who have been subject to a reorganisation procedure within the previous five years are not entitled to be subjected again to such procedure.

2.4 Please describe briefly how the company is placed into each procedure.

According to the Insolvency Law, if the insolvency petition meets the aforementioned conditions, the syndic judge shall issue a decision regarding the commencement of the common insolvency procedure. In case of failure to provide the Court with the information required by the Insolvency Law to open the general procedure, as well as if the debtor states its intent to perform a simplified procedure, the Court shall issue a decision regarding the commencement of a simplified insolvency procedure. In the case of a common procedure, the syndic judge shall appoint a judicial administrator, whereas a temporary liquidator shall be appointed in the case of a simplified procedure. Furthermore, the judicial administrator or the liquidator shall ensure the notification of the debtor's creditors. After the opening of the insolvency procedure, all deeds and correspondence of the debtor, of the judicial administrator or the liquidator shall contain the annotation: *"in insolvency"*, in English, Romanian and French (Rom: *"in insolventa"*, French: *"en procedure collective"*).

2.5 What notifications, meetings and publications are required after the company has been placed into each procedure?

Upon the commencement of the insolvency procedures, the judicial administrator shall send a notification to the creditors mentioned in the list filed by the debtor when depositing the insolvency petition. In case of opposition by the creditors, the judicial administrator shall notice the debtor and the Trade Registry in this regard. Furthermore, if the debtor owns assets that require a special record with the competent authorities, the judicial administrator or the liquidator shall send a copy of the decision regarding the commencement of the insolvency procedure to the court and to other relevant authorities providing for performance of such registration. After receiving the abovementioned notice, the creditors shall deposit the petition for the approval of their claims. Such claims shall be recorded with a register maintained with the Court. The aforementioned claims shall be subject to examination as provided by the Insolvency Law and performed by the judicial administrator, except for the claims ascertained with an enforcement title. All claims recorded with the aforementioned

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register are presumed to be correct and valid, unless such are challenged by the debtor, the judicial administrator or by the creditors. After all claims are verified, the judicial administrator or the liquidator shall establish a preliminary panel with all the claims against the debtor's patrimony. Such panel may be subject to the challenge of creditors, debtors and other interested third parties.

3 Creditors

3.1 Are unsecured creditors free to enforce their rights in each procedure?

According to Article 36 of the Insolvency Law, the opening of the insolvency procedure, as regards a debtor, triggers an automatic stay affecting all the judiciary and extra judiciary actions against such debtor or its assets, filed before the opening of the procedure, in order to recover the accounts receivable of the creditors. In order to render effective such provision, the court ruling initiating the insolvency procedure must be communicated to the courts having jurisdiction where the debtor has its registered office and to all the banks where the debtors hold bank accounts. As of the initiation of any insolvency procedure, the creditors are compelled to enforce their claims only within the frame of the respective insolvency procedure.

3.2 Can secured creditors enforce their security in each procedure?

The automatic stay which occurs when an insolvency procedure is opened against a debtor also affects the petitions filed by secured creditors which are prevented to enforce their rights after the competent court approves a filing pertaining to the opening of an insolvency procedure. However, a creditor that has a claim secured by a mortgage, pledge or other right *in rem* may request that the court lift such stay. In order to lift the stay, where the value of the collateral of the right *in rem* has been appraised to be covered by the value of the claim secured by such object, the court must find that:

- the object of the right *in rem* is not vital to the success of the proposed reorganisation plan; and
- if the object of the right *in rem* is part of an operational process, its detachment and separate realisation will not devalue the remaining assets.

The court may also lift the stay if it finds that the secured claim is not satisfactorily protected due to any of the following:

- the value of the object of the right *in rem* is under threat to depreciate;
- the claim may not be realised due to accrual of interest and penalties in relation to a higher-ranked claim; or
- the object of the right *in rem* is not insured against destruction or deterioration.

Moreover, the debtor, the judicial administrator or the liquidator may not dispose in any way whatsoever of the collateral asset, insofar as the creditor's account receivable is not entirely paid.

3.3 Can creditors set off sums owed by them to the company against amounts owed by the company to them in each procedure?

The Insolvency Law expressly provides in Article 52 that the opening of the insolvency procedure does not hinder the creditor's rights to invoke set off of their accounts receivables against the sums owned by them to the company subject to the insolvency procedure, provided that all the legal requirements relating to set off operations are being met. Nevertheless, the creditor must have submitted, in accordance with the requirements of the notification received from the judicial administrator or liquidator, its request for admittance of its account receivable with the table of accounts receivable.

4 Continuing the Business

4.1 Who controls the company in each procedure? In particular, please describe briefly the effect of the procedures on directors and shareholders.

In compliance with Article 47 of the Insolvency Law, the opening of the insolvency procedure lifts the debtor's right to administrate its business, meaning the debtor is no longer able to manage its activity and to manage or dispose of its assets. Such lifting extends over the assets that could be obtained by the debtor after the date of the opening of the procedure. However, the debtor's administration right is not lifted provided that he opts to enter into the judicial reorganisation procedure, according to Article 28 paragraph 1, letter h) or Article 33, paragraph 6. Nonetheless, absent a viable reorganisation plan and subject to continuous losses, the creditors, the creditors' committee or the judicial administrator may file a petition with the syndic judge demanding the lifting of the debtor's administration right. The Insolvency Law provides for a supervision period, between the opening of the judicial reorganisation procedure and either the confirmation of the reorganisation plan or the initiation of bankruptcy. Within such period, the debtor is allowed to continue the current activity and to perform payments to usual customers. In any case, the debtor's administration right is lifted *de jure*, once the bankruptcy procedure is opened. In such case, only winding-up necessary activities are allowed to be performed by the debtor. The banks where the debtor has accounts are notified not to dispose of available funds absent order from the judicial administrator or the liquidator.

4.2 How does the company finance these procedures?

According to the Insolvency Law, all the procedures mentioned thereto, including the notification and communication of the procedural deed made by the judicial administrator/liquidator, are financed out of the debtor's patrimony. The available funds are deposited into a special bank account. Such amounts are deemed as liquidation expenses and are included in the creditors' disbursement plan. Provided that no funds of the debtor are available for the legal insolvency procedures, the necessary payments shall be forwarded out of a special liquidation fund. According to the Insolvency Law, such liquidation fund shall be supplied out of the registration taxes owed to the Trade Registry Offices and by other public registries (such as the registries for agricultural companies and/or associations/foundations).

4.3 What is the effect of each procedure on employees?

Provided that the simplified procedure or the bankruptcy procedure is initiated against a company, the liquidator shall immediately proceed to the termination of the individual labour agreement of the company's personnel. In such case there is no need to follow the collective dismissal procedure provided by the Romanian Labour Code. However, the legal 15 days prior notice must be granted to such personnel.

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In order to comply with the European Union legislation, Romania has adopted on May 25, 2006 Law No. 200/2006 on the guarantee fund for the payment of salary receivables. Such law entered into force on January 1, 2007 and implements into the domestic law the Council's Decision No. 80/98/EEC regarding the approximation of laws of Member States relating to the protection of the employees in case of insolvency of their employer. Accordingly, the employers have the obligation to contribute monthly to the guarantee fund with an amount equal to 0.25% of the total fund of the gross monthly salaries of their employees. The purpose of the guarantee fund is to protect the employees against losses they may incur in case their employers are subject to an insolvency procedure. However, Law No. 200/2006 provides for a limitation of the amount of the salary receivables that may be paid from such fund, which may not exceed three average gross salaries per economy for each employee. If the activity of the employer returns to normal and the insolvency procedure is closed, the employers have to reimburse the amounts paid from the guarantee fund within a term of six months as of the issuance of the ruling attesting to the closing of such procedure. The guarantee fund provides for the payment of the following outstanding amounts to the employees, upon the request of the administrator/liquidator of the insolvent employer: **(i)** outstanding salaries; **(ii)** compensations due by employers for the leave that was not taken by employees, but only for a maximum of one year of work; **(iii)** compensatory payments, in case of termination of the labour agreement, in the amount established by the collective and/or individual labour agreement; **(iv)** compensations due by employers in case of work accidents or professional diseases; and **(v)** indemnities due by employers for the temporary cessation of their activity. However, such amounts shall be paid only for a term of three months.

4.4 What effect does the commencement of any procedure have on contracts with the company and can the company terminate contracts during each procedure?

Pursuant to Article 86 of the Insolvency Law, in order to maximise the level of the debtor's patrimony, the judicial administrator or the liquidator may maintain or terminate any contract, ongoing leases, or other long-term contracts, provided that such contracts have not been totally or substantially performed. For such purposes, the contractors shall notify the judicial administrator or the liquidator as regards its intent. The answer is to be granted in 30 days. Should this term be exceeded, the judicial administrator/liquidator may no longer maintain the contract, which in this case is considered terminated. However, any contractor which incurred damage upon such termination may file a legal action for damages, against the debtor. Provided that a seller of an immovable asset has withheld the ownership right until the performance of the entire payment, once the insolvency procedure is being opened, the sale is deemed as effective and the provisions from the above paragraph as not applicable. In case of movable assets sold to the debtor, if such assets are not in the debtor's possession and have not yet been paid by the debtor when the insolvency procedure is commenced, the seller is free to retrieve the assets. However, if the seller agrees the assets to be delivered, it must register its claim on the panel. In case the judicial administrator or the liquidator maintains a contract that is performed by periodical payments, it will not have to perform any outstanding payments. For such amounts, the contractor shall turn against the debtor.

5 Claims

5.1 Broadly, how do creditors claim amounts owed to them in each procedure?

According to the Insolvency Law, the judicial administrator must give notice to all the creditors as regards the opening of the insolvency proceedings, the last day of filing claims and the procedure which has to be followed for filing the claims. Such notice is also published with the Bulletin of Insolvency Procedures. The creditors must file a petition regarding the acceptance of the claims against the debtor respecting the time bar set forth in the court ruling which opened the insolvency procedure. Such petition broadly comprises the name of the creditor, the domicile/registered office, the claimed amount, the grounds of the claim as well as the collateral securing the claims, if any. Justifying documents for the account receivables for the securities must also be filed. The claims in connection with salary rights are enlisted according to the available payrolls. The claims not yet matured or under condition at the procedure opening date shall be temporarily enlisted at the creditors' claims panel. Save for unchallenged budgetary accounts receivable, all the other accounts receivable are subject to a verifying procedure. As a rule, all the forwarded accounts receivable are presumed to be valid and accurate absent a challenge by the debtor, the judicial administrator or the creditors. All the accounts receivable expressed in foreign currency are conversed and registered in RON at the exchange rate available at the date of opening of the procedure. Upon termination of the claims verifying procedures, the judicial administrator or the liquidator shall register with the competent court, a preliminary panel comprising all the claims against the debtor's patrimony. Such panel also indicates the nature of each claim: unsecured; secured; under condition, etc. Such preliminary panel is subject to challenging originating from the debtor, the creditors or any other interested party. Once all such challenges are solved by the syndic judge, the judicial administrator/liquidator draws up the final panel.

5.2 What is the ranking of claims in each procedure? In particular, do any specific types of claim have preferential status?

Secured claims have in any case priority in relation with their collateral asset. Under Article 121 paragraph 1 of the Insolvency Law, the funds obtained from the sale of any collateral assets shall be first distributed to the respective secured creditors. Moreover, according to Article 121 paragraph 3, a secured creditor is entitled to participate at any disbursements performed prior to the sale of its collateral asset. Such amounts shall be deduced from the price obtained from the subsequent sale of the collateral asset, if necessary to prevent the creditor to collect more than its account receivable.

Article 123 of the Insolvency Law institutes the following distribution priority, in case of a debtor winding-up: **(i)** taxes and any other procedural expenses; **(ii)** accounts receivable derived from labour relationships; **(iii)** accounts receivable derived from credits, including interests and related expenses, granted by credit institutions after the opening of the insolvency procedure, as well as deriving from the activity of the debtor further to the opening of the insolvency procedure; **(iv)** budgetary accounts receivable; **(v)** accounts receivable deriving out of life support obligations, child support or any other amounts necessary for subsistence means; **(vi)** amounts necessary for support of the individual debtor and his/her family; **(vii)** accounts receivable deriving from a) banking credit,

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including interest and afferent expenses, b) product delivery and c) rent; **(viii)** other unsecured accounts receivable; and **(ix)** subordinated accounts receivable, respecting the following order: a) amounts borrowed to the debtor by a shareholder holding at least 10% of the share capital; and b) accounts receivable deriving from free of charge deeds.

5.3 Are tax liabilities incurred during each procedure?

Regardless of the insolvency procedures being initiated, all debtors are subject to the laws applicable to their business enterprises, including the tax laws. In any case, the tax and levies may be mitigated by taking advantage of the wide operational losses.

6 Ending the Formal Procedure

6.1 Is there a process for "cramming down" creditors who do not approve proposals put forward in these procedures?

The cramming down of creditors appears when a class of creditors accepts a reorganisation plan. Each claim gives the right to one vote, within the class where the claim belongs. According to the Insolvency Law, there are four classes of claims: **(i)** secured claims; **(ii)** budgetary claims; **(iii)** unsecured claims of the essential creditors for the activity of the debtor; and **(iv)** other unsecured claims. A plan is deemed as accepted by a class of claims once the plan is voted with an absolute majority by the creditors holding claims in such class. A plan is confirmed by the delegate judge if three out of the four classes previously mentioned have accepted the plan, provided that at least one disfavoured class votes the plan. However, in order for the delegate judge to confirm the plan, each disfavoured class must be subjected to an equitable and correct treatment, comprising, *inter alia* that: **(i)** none of the classes/claims rejecting the plan receives less than they would in case of liquidation; and **(ii)** none of the classes/claims receives more than the total value of the account receivable.

6.2 What happens at the end of each procedure?

In each stage of each procedure provided by the Insolvency Law, the syndic judge may pass a ruling ending the procedure and deleting the debtor from the registry where it is registered, provided that there are insufficient assets or no assets at all to cover the expenses incurred during each procedure, and no creditor forwards such amounts. The reorganisation procedure or liquidation procedure according to a plan may be closed by a ruling of the syndic judge based on fulfilment of the entire payment obligations undertaken in the plan.

A bankruptcy procedure is closed by the syndic judge upon approval of the final report provided that all the available fund and assets have been distributed to the creditors and the unclaimed fund have been deposited in a bank account.

7 Alternative Forms of Restructuring

7.1 Is it common to achieve a restructuring outside a formal procedure in Romania? In what circumstances might this be possible?

According to the Romanian legislation *Judicial reorganisation* is the procedure applied to the debtor as legal person, in order to pay his debts according to the payment schedule of claims. The reorganisation procedure implies the preparation, approval, implementation and observance of a plan, called *reorganisation plan*, which may provide, as a whole or separately, for:

a) operational and/or financial restructuring of the debtor;

b) corporate restructuring by modification of the structure of the share capital; and/or

c) limitation of activity by liquidation of certain assets from the debtor's estate.

The conventional restructuring of the activity is defined only in direct connection with the labour legal provisions. The law does not indicate specific conditions in order to enter in this procedure.

7.2 Is it possible to reorganise a debtor rather than realise its assets and business?

The Reorganisation process is part of the insolvency procedure being a first step towards the intention to save the economic activity. The Romanian Law allows the debtor, or the syndic judge to propose a reorganisation plan in order to increase the chances of saving the company.

7.3 Is it possible to achieve an expedited restructuring of the debtor by means of a pre-packaged sale? How is such a sale effected?

The Romanian law does not allow a pre-packaged sale. Such a procedure could be considered to be used in the fraud of the creditors.

8 International

8.1 What would be the approach in Romania to recognising a procedure started in another jurisdiction?

Such matter is currently regulated by Law No. 637/2002 regarding the regulation of private international law relationships in the field of insolvency. The Law is structured by two titles. The first title represents the enactment of the UNCITRAL Model Law on Cross Border Insolvency, applicable to the relationships with all foreign states, except for the Member States of the European Union. According to such title, a representative of a foreign procedure has active capacity to stand trial in order to apply to the Romanian courts for recognition of the foreign procedure in which it has been appointed. The foreign representative must provide a statement regarding all the foreign procedures opened as to its knowledge against the debtor. The court needs to be aware of all the other foreign procedures in order to render the recognition decision and, particularly, for any type of relief that it has been requested to render. Such relief has to be consistent with other simultaneous insolvency procedures regarding the same debtor. The court may resolve upon the recognition of the foreign procedure only if the summoning procedure is legally fulfilled. Such recognition comprises mandatory relief measures and even triggers an automatic stay. However, in those situations where the recognition of a foreign procedure would run counter to Romanian principles of public order, the petition for recognition may be dismissed. The second title of the Law is transposing European Council Regulation No. 1346/2000 on insolvency procedures in the frame of domestic legislation, and applies only to the relationships with EU Member States. However, considering Romania's accession to the EU, the Regulation is currently directly applicable to Romania. The

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principle that stands at the basis of the intra European Union insolvency relationships is that any court resolution for the commencement of an insolvency procedure rendered by the competent court of an EU Member State is directly recognised in all the other Member States if the resolution becomes effective in the state where it was rendered. Moreover, the court ruling which opens an insolvency procedure in an EU Member State produces the same effects in any other Member State as if under the law of the state of commencement, without any prior formalities.

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