



CHAMBERS
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Banking & Finance

Law & Practice – Romania

Contributed by
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Attorneys at Law (ZRP)

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ROMANIA

LAW AND PRACTICE:

p.3

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The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Law and Practice

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ROMANIA LAW AND PRACTICE

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Zamfirescu Racoti & Partners Attorneys at Law (ZRP) stands as a provider of the most comprehensive portfolio of legal services on the market, with highly reputed lawyers and widely recognised expertise in business law and litigation. Founded in 2005 by the merger of two law firms, both established in 1995, ZRP offers high-quality and effective services in both consultancy and litigation areas, integrated through the knowledge and expertise of cross-

practice industry teams. The firm enjoys a reputation as one of the leading law firms in Romania, assuring business and litigation support, and representation. ZRP has long been recognised as a leading legal practice in the banking and finance sector, offering first-class service across the full range of financial products and banking litigation matters for corporate lenders and more than 20 banking institutions.

Authors



Ioana Racoti is senior partner and founder of the firm, specialising in banking and capital markets. Last year alone, Ioana was involved in high-profile projects for corporate giants such as Alro SA and Vimetco NV. She mainly represents lenders and international banks/financial institutions in transactional work, and regularly deals with all aspects of financing and capital markets transactions, private placements and public offerings. She frequently advises on banking regulatory matters, lending procedures and structured finance products, and is active in other fields of banking law, such as M&A and restructuring, project and asset finance, and mortgaged loans. Ioana has also developed an extensive practice in energy and natural resources, being highly sought-after as an adviser for intricate projects in the oil and gas industry, and the energy sector. She is co-coordinator of the banking and finance department, and co-ordinator of the capital markets and energy and natural resources practices.



Elena Iacob, a partner, is co-coordinator of the banking and finance department and head of the public procurement practice. Elena has extensive expertise in regulatory issues and financing transactions, and was a founding member of the Romanian branch of the European Society for Banking and Financial Law. Her work includes assisting numerous banks, non-banking financial institutions, payment institutions and agents of e-money institutions in statutory and regulatory matters; drafting and reviewing standard documentation for financial products and service; analysis of guarantees; assistance in secured and unsecured loan transactions; syndicated facilities; and the creation and perfection of guarantees and securities. She has been involved in complex transactions ranging from operations for establishment/authorisation of financial institutions to operations for attracting financing (including the issuance of bonds, loans without terms, subordinated loans, convertible loans, project financing and secured or unsecured loans) and credit portfolio transfers.

1. Loan Market Panorama

1.1 The impact of recent economic cycles and the regulatory environment

In 2016-17, the Romanian loan market has endeavoured to recoup the decrease it experienced in the aftermath of the economic and financial crisis, while the retail loans segment was confronted with a wave of unpredictable legislation creating a novel favour regime for consumers. Draft legislation promoted by Parliament members on the conversion into Romanian lei of Swiss franc consumer loans, and on the giving in payment of mortgaged immovable assets as means of settlement of consumer loans, made their way into enacted laws.

Despite the legislative turmoil in the consumer credit area, the banks' appetite for new placements and new clients remained high on a very liquid market, although the number

of finalised deals was tempered by the risk-adverse mindset installed during the crisis.

As in recent years, bank loans to companies were mainly destined for the refinancing of existing debt with only a small share of new money for working capital or for some investments.

Significantly sized non-performing loans portfolios continued to be traded, with several transactions of this type being closed in 2016.

1.2 The high-yield market

Facing the steady reluctance of bankers to risks, some finance needs have been covered in mezzanine or high-yield structures. However, such arrangements rather complemented than actually competed with bank financing. One cannot claim a notable impact of high-yield structures on the Romanian financing market.

1.3 Alternative credit providers

In retail lending, there has been a substantial rise in the number of non-banking providers of credit, especially in the market of pay-day loans transacted online.

In project finance, international financial institutions (eg, European Bank for Reconstruction and Development, International Finance Corporation, Black Sea Trade and Development Bank) played their part as a financing catalyst for industries/projects of interest. The schemes of state guarantees supporting financing for small and medium enterprises, for rural credit or for housing (population) occupy an important role in maintaining or even slightly increasing the volume of new loans.

Bank loans remain the principal source of financing on the Romanian market, by far prevailing over other types of equity or non-equity financing.

The local capital market was until recently not an attractive alternative for financing, considering the low number of listed companies and poor liquidity of the Bucharest Stock Exchange. Still, in September 2016 FTSE Russell placed Romania on the watch list for a possible classification as an emerging market, thus recognising the growth potential of the market. In 2017 the interest for financing on the capital market increased, several initial public offerings were completed in the first half of the year and a couple more are expected to take place until the end of 2017.

Under pressure to reduce costs, local companies as well as the government turned sometimes to external capital markets.

1.4 Evolution of banking and finance techniques

Generally, bankers have paid more attention to the requests coming from good customers and as such banks have improved flexibility in negotiations and response time. Secured bank loans with full recourse against borrowers remains the prevailing instrument on the Romanian financing market, despite companies' efforts to seek less expensive and less constraining funding alternatives. Lately, the capital market has increased in importance as a financing source in the eyes of local companies.

1.5 Recent or expected legal, tax, regulatory or other developments

The rather rushed adoption by the Romanian Parliament of radical measures in the consumer credit area has raised concerns for the banks and, to some extent, for other foreign investors, the actual effects of recent consumer credit-related legislation remaining to be seen in the next years. The provisions related to the possibility to give for payment a mortgaged immovable asset, which entered into force in May 2016, apply notwithstanding to consumer loans grant-

ed before the enactment of such provisions. A decision by the Constitutional Court - apprised by several banks with claims of retroactivity and breaches of other principles of law - found that some conditions in the law on giving in payment were illegal. Unless the government/Parliament approves clearer provisions to satisfy the instructions traced by the Constitutional Court, the least one can expect are different interpretations from the courts in various cases vested to them.

The law on personal insolvency passed in 2015, a novelty in Romanian legislation, was expected to become effective at the end of December 2016. Although the implementing norms were enacted in June 2017, entry into force of the personal insolvency law was further postponed until January 2018.

Among regulatory developments it should be noted that there is an increased regulation of consumer credit intermediaries and the authorisation requirements for debt collection companies acting as assignees of non-performing consumer loans. Consumer loans may no longer be transferred to entities other than authorised professional lenders or, in the case of non-performing receivables deriving from consumer loans, to companies which fulfil certain minimum share capital requirements and are registered with the National Agency for Consumer Protection. Consumer credit rules apply to some extent to real estate developers granting credit in relation to their sales.

Notwithstanding the enhanced consumer protection rules, the perspectives for 2017 on the financial market are positive. Focus is again on lending, banks are competing strongly for clients with improved lending offers. There is a positive trend for the growth of loans volume both in retail and corporate areas. Industry, health services and real estate development (mainly commercial and offices) remain on the list of sectors attracting financing.

Banks are decreasing advance payment requirements for consumer loans for acquisition of immovable properties and are participating in various schemes for SMEs or rural credit.

2. Authorisation

2.1 Requirements for authorisation to provide financing to a company

Romanian credit institutions and non-banking financial institutions require a licence from the National Bank of Romania to carry out lending activities. Such institutions are prohibited to include in their object of activities other activities than the ones specifically provided by the law. Some other licensed financial services providers, eg payment institutions and financial investment companies, are entitled

to carry out ancillary lending activities in relation to their principal activities.

Credit institutions authorised in member states of the European Economic Area may provide services in Romania directly, following a notification made to the National Bank of Romania through the supervisory authority from the origin member state, or by creating a local branch.

Credit institutions from third countries may carry out activities in Romania through branches licensed by the National Bank of Romania.

3. Structuring and Documentation Considerations

3.1 Restrictions on foreign lenders granting loans

Romanian companies may borrow from foreign entities, with no authorisation necessary. For statistical purposes in relation to external private debt, residents must notify the National Bank of Romania the medium- and long-term loans taken from non-resident entities.

Foreign entities carrying out lending activities on a professional basis in Romania should seek to obtain a licence as a non-banking financial institution or credit institution from the National Bank of Romania, or invoke the benefit of the EEA passport.

3.2 Restrictions on foreign lenders granting security

There are no significant differences when creating security or guarantees in favour of foreign lenders, compared to the conditions applicable in respect of Romanian lenders. Some restrictions prevent acquisition of land by foreign entities or individuals, other than EU nationals.

3.3 Restrictions and controls on foreign currency exchange

There are no restrictions, controls or other concerns on foreign currency exchange. The National Bank of Romania may institute temporary safeguard measures in exceptional situations but no such measures have been deemed necessary until present.

3.4 Agent and trust concepts

The agent concept is explicitly recognised by the law for movable securities but not for immovable securities. There is a legal concept regulated by the Romanian Civil Code enacted in 2011, called “fiducia,” which resembles the trust concept. However, given the extreme formalism of “fiducia” such a concept is hardly, or not at all, suitable for the prerequisites of flexibility and speed in financing deals.

3.5 Loan transfer mechanisms

There are various legal mechanisms for transferring loans with the associated security package, ranging from spin-offs to contractual methods, including assignment of receivables, assignment of contracts or novation. The assignment of money receivables (together with the associated securities and guarantees) is generally permitted. However, for consumer loans the assignee must be an authorised entity. The transfer of a contract typically requires the consent of the borrower or may involve conditions agreed to in the underlying credit agreement in respect of the qualification of the assignee (eg, financial institution).

3.6 Debt buy-back

There are no special conditions regarding debt discounting/ debt transfer to the borrower or sponsor.

4. Tax

4.1 Withholding tax

Withholding tax at a general rate of 16% applies to the payments of interest in accordance with the Romanian Fiscal Code. Based on relevant double tax treaties, lower rates or zero tax may be applicable.

4.2 Other taxes, duties, charges or tax considerations

There is no stamp duty or similar charges applicable to making loans to Romanian entities. Depending on the security package, one should take into consideration taxes for the registration of immovable securities in the land book, notary fees for the creation of immovable securities or registration fees in the Electronic Archive for Movable Securities.

4.3 Usury laws

Certain limitations of default interest apply in case of consumer loans, inter alia, default interest cannot exceed the overdue principal in consumer loans; in certain situations such as unemployment, reduced income or health problems, the default interest rate cannot exceed by more than 2% the current interest rate for a determined period.

5. Guarantees and Security

5.1 Assets typically available and forms of security

Typical securities include immovable assets (land, buildings) or movable assets (equipment, inventories, shares, receivables, cash in bank accounts etc). The securities that do not require taking possession over an asset are created by way of mortgage agreements (movable, respectively immovable mortgages). Mortgages have an accessory nature, ie are subject to validity and enforceability, and are limited to the amount, of the secured claim.

Personal guarantees are rather frequently required by lenders in addition to collateral, usually from individual or corporate shareholders and/or other affiliated persons (“sponsors”) of the borrower. Personal guarantees may be provided either in the form of accessory guarantees (“fidejussio”) or in the form of independent guarantees (“letters of guarantee”).

As a condition for validity, conventional immovable mortgages require authentication by a notary public. Currently, the immovable mortgage is validly created by agreement in authenticated form and the registration with the land book ensures the priority and opposability of the mortgage in relation to third parties. Effective from the finalisation of the cadastral measurements across the relevant territory, the registration of the immovable shall have constitutive effect, ie the immovable mortgage shall be created by the registration with the relevant land book office. The notarial fees for authentication of the mortgage agreement and the fees for registration of the mortgage with the land book are calculated as a percentage of the amount of the secured claim.

Movable mortgage agreements do not as a rule require authentication, being often concluded by agreements under the private signature of the parties. Generally, security or guarantee agreements that do not require authentication as condition for their validity may be concluded under private signature by correspondence.

The movable mortgage is perfected when the secured obligation comes into effect, the mortgagor acquires rights over the mortgaged assets and the publicity formalities have been fulfilled. Ranking of the movable mortgage and opposability towards a third party are ensured by registration with the Electronic Archive for Movable Securities. For mortgages over receivables the notification of the debtor of the mortgaged receivable is additionally required for the opposability of the mortgage.

5.2 Floating charges or other universal or similar security interests

As a rule, goodwill or universalities of movable assets (eg, inventories, receivables, equipment and machineries) may be the object of mortgages. However, in the case of immovable assets the registration with each relevant land book is required for opposability purposes, thus making the floating charge concept mostly inapplicable to the immovable assets part of goodwill. The object of the movable mortgage needs to be described with sufficient precision in the mortgage agreement, so to allow the identification of the mortgaged asset. In the case of universalities, the mortgage agreement must describe the nature and content of the mortgage, a stipulation whereby the mortgage extends to “all movable assets” or “all present and future assets” of the mortgagor does not fulfil the condition of “sufficient precision.” In respect of

mortgages over the bank accounts, the mortgage agreement must specify the account details as a validity condition.

It should be noted that the mortgaged movable asset transferred by an undertaking that sells in its ordinary course of business assets of the respective type shall be acquired free of mortgage by effect of the law, and, in such a case, the mortgage shifts over the proceeds (money or assets) received as a result of the transfer.

5.3 Downstream, upstream and cross-stream guarantees

For upstream, cross-stream or downstream guarantees there are limitations for Romanian companies deriving from general rules related to the cause of the agreement, ie the corporate benefit that should be justified by such corporate guarantors. While the group and the group benefit are not concepts recognised explicitly in the companies’ law, accepting such guarantees requires a case-by-case analysis.

Romanian companies law forbids a joint stock company to guarantee, directly or indirectly, the repayment of loans or other personal obligations of the company’s directors. The prohibition extends to transactions involving companies in which the director holds at least 20% of the share capital or of which he is a director, thus restricting guarantees between companies with common directors. In addition to civil sanctions, the failure to observe such restrictions may constitute a criminal offence, except in cases of treasury operations carried out between the company and other companies controlled by, or controlling, directly or indirectly, the first company.

5.4 Restrictions on target

Financial assistance is prohibited explicitly by the Romanian companies’ law in cases of joint stock companies, and is also generally considered prohibited by analogy for other forms of companies. A company cannot make advances or loans or create guarantees in view of the subscription or acquisition by a third party of the company’s shares.

5.5 Other restrictions

There are no other notable restrictions in connection with the granting of security or guarantees. The creation of a mortgage may require approval by the general meeting of a mortgagor’s shareholders, depending on the form of company, the value of mortgage assets compared to the total value of the company’s assets (and to the value of the company’s fixed assets in the case of listed companies) and the provisions of the company’s articles of association.

5.6 Release of typical forms of security

Release of security usually takes the form of a release letter issued by the secured creditor/s, followed by de-registration of the security from the relevant publicity registries (land

book, Electronic Archive for Movable Securities, Central Depository for mortgages over listed shares) and by corresponding notices to debtors of the mortgaged receivables. In the case of immovable mortgages the release letter must be authenticated by a notary public.

5.7 Rules governing the priority of competing security interests

Generally, priority is determined by the moment of registration of the mortgage with the relevant publicity registries. Subordination may be agreed on contractually and has binding character among the contracting parties. However, in insolvency proceedings the order of claims is established by law and cannot be derogated from.

6. Enforcement

6.1 Circumstances in which a secured lender can enforce its collateral

Enforcement of movable mortgages may be made either as agreed between the mortgagor and the mortgagee in the mortgage agreement, in accordance with the rules provided by the Civil Code, or via generally applicable enforcement procedures set forth by the Civil Procedure Code. The enforcement of personal guarantees and the enforcement of immovable mortgages are governed by the provisions of the Civil Procedure Code.

Except for consumer loans where the law sets forth limitations to enforcement (eg, enforcement only after a certain number of days of payment delay, prior notice and non-enforcement period to allow restructuring of the loan, obligation of creditor to propose restructuring options to the borrower), the secured lenders can enforce the collateral upon occurrence of default events as provided in loan agreements. The parties can negotiate and typically provide in the loan agreement the conditions, if any, agreed in relation to enforcement, such as the obligation of the lender to notify about the initiation of enforcement, the order of enforcement in the case of multiple collateral, some rules related to the valuation of the mortgage in the case of enforcement governed by the Civil Code.

Mortgaged assets may be sold by direct sale by the mortgagor, with the agreement of the mortgagee, or otherwise by methods provided in the mortgage agreement, or via public auctions conducted by the bailiff vested with the enforcement file at the request of the secured creditor.

6.2 Foreign law and jurisdiction

The choice of a foreign law as governing law of the loan agreement is allowed and will be upheld by Romanian courts. Syndicated facilities or other loans granted by foreign lenders were typically governed by foreign law, either

English law or the law of the origin state of the lender. The submission to a foreign jurisdiction would be upheld in most situations; limitations apply when dealing with consumers.

As a rule, security agreements pertaining to assets located in Romania, as well as securities over shares issued by Romanian companies that are not traded on a foreign regulated market are governed by Romanian law. The Romanian Civil Code provides that mortgage agreements validly concluded represent writs of execution.

6.3 A judgment given by a foreign court

A judgment given by a foreign court or an arbitral award would be enforceable in Romania subject to recognition by Romanian courts in accordance with applicable EU regulations and/or international private law rules. Recognition procedures do not usually require a retrial of the merits of the case.

Romanian courts have exclusive competence to judge matters regarding the enforcement of a writ of execution in the Romanian territory.

6.4 A foreign lender's ability to enforce its rights

There are certain limitations to acquisition by non-EU nationals of land in Romania. In practice, special purpose companies are established/used for acquiring ownership over real estate properties under enforcement procedures.

7. Bankruptcy and Insolvency

7.1 Company rescue or reorganisation procedures outside of insolvency

Ad hoc mandate and preventive concordat are the pre-insolvency procedures recognised by the law, providing general rules allowing the debtor to apply to the court in view of obtaining an agreement with the creditors for the negotiation/restructuring of the debt. Such procedures are quite seldom used in practice, there are no significant success stories. More often, debtors reach an agreement with creditors outside court procedures, by negotiation and conclusion of restructuring agreements.

7.2 Impact of insolvency processes

Upon commencement of the insolvency process the lender's claims can only be satisfied in enforcement carried out by the official receiver/liquidation under the supervision of the syndic judge. On an exceptional basis, and subject to certain conditions, including on the condition for the mortgaged assets not to be needed for the implementation of a reorganisation plan, secured lenders can make an application to the court to approve the enforcement against the assets object of security outside insolvency proceedings.

7.3 The order creditors are paid on insolvency

In a company's insolvency, secured creditors rank before unsecured ones. Generally, the expenses related to insolvency proceedings (taxes, costs of enforcement, fees of the official receiver/liquidator) and the claims coming into effect after the opening of insolvency proceedings take precedence over the secured claims.

7.4 Risk areas for lenders

The risks for lenders in insolvency proceedings are mainly related to the position (secured or unsecured creditor, ranking of secured claim, amount of claim in total claims in the respective category), satisfaction of the claim always depending on the proceeds generated by reorganisation of the activity or the liquidation of the debtor's assets.

8. Project Finance**8.1 Introduction to project finance**

Project finance is governed by rules applicable to financing in general. In practice, special purpose entities are incorporate to act as borrowers and to limit the exposure of the investor. The collateral is created over the assets to be acquired, developed and/or used for the project by such a borrower. However, lenders quite often request personal guarantees from sponsors or collateral to cover excess or unexpected costs or sometimes to guarantee full reimbursement of the loan.

8.2 Overview of public-private partnership transactions

There have been few PPP transactions implemented so far. Attempts have been made to implement significant PPPs especially in the infrastructure sector, such as the planned concession of the Comarnic – Brasov highway, but projects failed mainly due to the lenders withdrawing from the project due to a lack of confidence in the project's capacity to generate sufficient revenues.

In May 2016, new public procurement primary legislation entered into force, transposing the provisions of relevant directives and shifting the focus from "lowest price" criterion in public procurement to "value for money." Considering the national strategy in public procurement approved officially which, among others, contains measures for enhancing the competences of the personnel of contracting authorities handling public procurement procedures, there are positive signs for future projects. Several projects appear to have been initiated in the medical services infrastructure area (projects for regional public hospitals or local hospital facilities) and there is room for further PPP initiatives, especially in the area of infrastructure.

8.3 Government approvals, taxes, fees or other charges

No government approval is required for fully private project finance transactions and no special taxes, fees or charges are applicable. Contracting public debt, including creating state guarantees or PPPs, is subject to various approvals, by the Ministry of Public Finances, other ministries/authorities and/or by the government depending on the value.

Governmental, as well as local public debts are registered with a registry kept by the Ministry of Public Finances. The law governing the contract between a contracting authority/entity and the private partner is, in most cases, the Romanian law, while the finance documentation may be subject to Romanian law or foreign law as negotiated with the financiers.

8.4 The responsible government body

The financial commitments of the central or local authorities are subject to approvals or endorsement by the Ministry of Public Finances, other authorities likely to be involved are the Ministry of Transportation, the recently reorganised National Company for Road Investments and the local authorities for local infrastructure projects.

8.5 The main issues when structuring deals

When structuring a project deal transaction attention should be paid, among others, to the structure of securities, feasibility of the project and means of co-operation with, or means of support by, the public authority in the project. Special attention is required on state aid issues in transactions with state-owned companies, such as energy producers or utilities companies. In energy projects one should consider the conditions related to the power purchase agreements deriving from the energy law that requires all trades to be conducted on the centralised market operated by OPCOM. There are no restrictions worth mentioning on foreign investment, leaving aside general restrictions on dealing with persons/entities subject to international sanctions in accordance with applicable treaties.

Limited liability companies or joint stock companies are the preferred forms for project companies. Typical funding techniques include share capital contributions by investors combined with loans granted by banks or IFIs, but there are no limitations to funding a project on the capital market or from other sources.

8.6 The acquisition and export of natural resources

Romania is a member state of the European Union, adhered to the principles of free movement of capitals, workforce, goods and services and the liberalisation of markets. Romania is also a member of the World Trade Organization and party to various bilateral trade agreements. There are no uncommon restrictions to acquisition or export of natural

resources. Certain limitations derive from technical conditions, such as limited interconnection capacity in gas and electricity.

8.7 Environmental, health and safety laws

Various environmental and health and safety laws and regulations apply to projects which have an environmental impact, involve health or safety risks or, generally, relate to labour conditions of the personnel employed within the project. The environmental authority is the National Agency for Environmental Protection, under the co-ordination of the Ministry of Environment, Waters and Forests. For health and safety issues, relevant authorities include, without limitation, the Public Health Divisions subordinated to the Ministry of Health and the Labour Inspection under the co-ordination of the Ministry of Labour.

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