Romania


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1 Overview

1.1 What are the main trends/significant developments in the lending markets in your jurisdiction?

We have noticed an increase in commercial real estate properties financing in 2017 compared to 2016. Investments in Romanian commercial real estate properties reached about EUR 1 billion in 2017, up 10% compared to the previous year (EUR 890 million).

The number of transactions increased in Romania, with the average deal size standing at about USD 28.5 million. Bucharest accounted for some 36% of the total investment volume, less than in 2016. The retail transactions (43%) dominate the market volumes, while industrial, hotels and office accounted for over 22%, 18% and 17% respectively.

1.2 What are some significant lending transactions that have taken place in your jurisdiction in recent years?

European Investment Bank financing in Romania came to a total of EUR 1.3 billion in 2017. The total lending of the EIB Group (the European Investment Bank and the European Investment Fund) in Romania in 2017 was EUR 1.87 billion for infrastructure EUR 972 million, small and medium-sized enterprises EUR 624 million, environment EUR 265 million, innovation and skills EUR 6 million. The European Fund for Strategic Investments (EFSI) is an initiative to help overcome the current investment gap in the EU.

Other sources for financing in Romania are syndicated loans. The Romanian syndicated loan market is estimated at EUR 1 billion. For example, in June 2017, UNICREDIT BANK and BRD-GROUPE SOCIETE GENERALE provided A&D Pharma Group with a syndicated loan for a value of EUR 177 million.

2 Guarantees

2.1 Can a company guarantee borrowings of one or more other members of its corporate group (see below for questions relating to fraudulent transfer/financial assistance)?

A company may guarantee the borrowings of other members of its group if the guarantor has a certain commercial benefit deriving from the guarantee.

The most important restriction provided by Romanian law on this matter is that the guaranteeing operation should not represent a financial assistance transaction.

The assessment of the commercial benefit is not subject to any particular criteria. Thus, the guarantor's directors shall carefully asses each case, considering the ratio between risks undertaken and the potential benefits that might be obtained by the guarantor, and also the general financial situation of the borrower, the general and specific terms of transaction and the group relationship.

2.2 Are there enforceability or other concerns (such as director liability) if only a disproportionately small (or no) benefit to the guaranteeing/securing company can be shown?

According to Romanian law, financial assistance is prohibited. This interdiction is stipulated specifically only for joint stock companies, but there are opinions arguing that it should also be applied to limited liability companies also.

Secondly, as shown in question 2.1, a guarantor should have a certain interest in relation to any guarantee granted to support borrowings of another corporation.

Also, the Romanian Company Law sets that joint stock companies cannot guarantee the borrowings of their directors and the borrowings of companies where directors or their spouses or relatives are directors or shareholders of more than 20% of the share capital.

If one of these rules is breached, the guarantee will be declared null and void and can attract criminal liability of the directors in specific cases.

Another requirement set by the law for the guarantor is to possess and maintain sufficient assets in order to cover the secured liabilities, except where the creditor required that the guarantor was a particular person.

2.3 Is lack of corporate power an issue?

Generally, in order to be able to grant loans, a company must have included in the scope of activity, and appropriately authorised, the carrying out of lending activities.

However, in order not to fall within the scope of normative acts applicable in the field of financial-banking activities issued by the National Bank of Romania, the borrowing company will have to prove the necessity, the opportunity and the efficiency of such a lending operation, in the case of affiliated companies, that is, when the loan is granted within the company group members.

2.4 Are any governmental or other consents or filings, or other formalities (such as shareholder approval), required?

In principle, there are no such consents. Still, in the case of joint stock companies, the Board of Directors or the Directorate will be able to conclude legal acts in the name of and on behalf of the company by which to establish security interests over the company's assets whose value exceeds half of the book value of all the company's assets at the date of conclusion of the legal act, only with the prior approval of the general meeting of the shareholders.

In addition, when making any payments equal to or greater than EUR 50,000 or equivalent to non-residents, residents of credit institutions have an obligation to fill in a form provided by the credit institution used for the payment or by the payment authority. Also, credit institutions may use forms according to their own requirements in order to make any payments to non-residents with a value of less than EUR 50,000 or equivalent at the date of payment.

2.5 Are net worth, solvency or similar limitations imposed on the amount of a guarantee?

In general, no (except for approvals for the guarantees referred to in question 2.4).

2.6 Are there any exchange control or similar obstacles to enforcement of a guarantee?

In principle, no. Yet, in case of foreign lenders, the borrower can be restricted or limited from paying due amounts and the lender can be restricted from exercising its rights against a borrower. This safeguard measure may be imposed by the National Bank of Romania, according to the regulation on foreign exchange regime.

3 Collateral Security

3.1 What types of collateral are available to secure lending obligations?

The New Civil Code provides the following types of collateral available in order to secure lending: pledge; and immoveable mortgage.

3.2 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

An agreement in relation to each type of assets is not required, only a distinction between movable and immovable property and shares.

Firstly, a general pledge agreement may be concluded that can cover most types of asset, such as bank accounts, stocks, inventory, receivables, intellectual property, intangible assets and universalities, or it can be divided into many agreements for each type of asset.

Secondly, in order to take a collateral security over the real estate of the borrower an immoveable mortgage agreement is usually used which may include the rent and the insurance pertaining to the real estate.

Thirdly, the share mortgage agreement is used when the lending transaction is secured by the shareholders of the borrower company with their own shares.

3.3 Can collateral security be taken over real property (land), plant, machinery and equipment? Briefly, what is the procedure?

Yes, collateral security can be taken over land, plant, machinery and equipment.

In case of the land, an immoveable mortgage agreement will be concluded. The agreement will be authenticated by a public notary and registered in the Land Book. If some moveable assets are accessories to the real estate, the agreement will also be registered in the Electronic Archive.

The plant, machinery and equipment are usually brought as security by means of pledge agreement. This does not require the authentication by a public notary, but only a deed that describes the assets in a sufficiently precise way. The description is sufficiently precise, even if the asset is not individualised insofar as it reasonably allows it to be identified.

3.4 Can collateral security be taken over receivables? Briefly, what is the procedure? Are debtors required to be notified of the security?

Under Romanian law, collateral security can be taken over receivables by way of pledge. The pledge may have as its object either one or more receivable or a universality of receivables.

The debtor of the pledge debt must be notified in writing, with the notification coming into effect as of the date on which the debtor received the communication. On the other hand, the effects of the notification are not conditional to the debtor's effective receipt of the notification; according to the law, the pledge lender is only obliged to inform the debtor about establishing the pledge.

The pledge on a receivable that is also guaranteed with a moveable or immovable mortgage must be registered with the Electronic Archive or the Land Book.

The pledge of a receivable confers upon the creditor, when the conditions for the commencement of forced execution are met, the right to take over the title of the claim, to demand and obtain the payment or, at his choice, to sell the claim and to take the price, all within the guaranteed amount.

3.5 Can collateral security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

Collateral security can be taken over cash deposits in bank accounts, according to Romanian law. In this case, the bank account must be individually identified in the mortgage agreement.

The publicity of a mortgage on the bank accounts opened at a credit institution is made by registering the mortgage into the archive or can be satisfied by checking the account.

In order to ensure priority, the lender should hold control over the mortgaged bank account.

A creditor acquires control over an account if (i) the mortgage lender is the actual credit institution where the account is opened, or (ii) the creator, credit institution and creditor agree in writing that the credit institution, without requiring the consent of the mortgage constituent, will follow the instructions by which the creditor has the amounts in the account, or (iii) the mortgage creditor becomes the account holder.

3.6 Can collateral security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Can such security validly be granted under a New York or English law governed document? Briefly, what is the procedure?

Collateral security may be taken over shares in companies incorporated in Romania usually by means of pledge.

The pledge on the shares shall be made by means of a private signature, showing the amount of the debt, the value and the category of the guarantee shares, and, in the case of registered or bearer nominatives issued in the material form, also by mentioning the pledge by title, signed by the creditor and the shareholder or their trustees.

The pledge shall be registered in the register of shareholders held by the board of directors, respectively by the directorate, or, as the case may be, by the independent company keeping the shareholder register. The pledge creditor will receive the proof of registration.

The pledge becomes opposed to third parties and acquires a rank in order of preference of the creditors as of the date of registration in the Electronic Archive of the Real Securities Guarantees.

Even if the legal basis of the constitution, transfer, restraint or extinction of the collateral security was constituted by the application of another law, the pledge will be subject to the law of the place where the asset is situated. The validity, the publicity and the effects of the mortgage or pledge will be subject to Romanian law, therefore being necessary to conclude one of the mortgage agreements shown above.

3.7 Can security be taken over inventory? Briefly, what is the procedure?

Under Romanian law, a general pledge agreement may be concluded over inventory. This agreement is not subject to the authentication of the public notary, but the assets must be descripted in a sufficiently precise way. As shown above, the description is sufficiently precise, even if the asset is not individualised insofar as it reasonably allows it to be identified.

The description can be made by drawing up a list of mortgaged movable assets, by determining the category to which they belong, by indicating the quantity, by setting a determination formula and by any other means that reasonably allows the identification of the mortgaged movable asset.

3.8 Can a company grant a security interest in order to secure its obligations (i) as a borrower under a credit facility, and (ii) as a guarantor of the obligations of other borrowers and/or guarantors of obligations under a credit facility (see below for questions relating to the giving of guarantees and financial assistance)?

There is no such prohibition under Romanian law, therefore a company may grant a security interest in order to secure its obligations under a credit facility, both as a borrower and as a guarantor of the obligations of other borrowers and/or guarantors of obligations.

3.9 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets?

As a general rule, in the Romanian procedure related to granting security over different type of assets, there are is no stamp duty or other similar fee.

The only fees payable are the ones associated with: the registration of the mortgages in the Electronic Archive or other public register; the authentication of the immovable mortgage agreement by a public notary; and the authorised translations of the finance documents; as well as the registration of such an agreement in the Land Book.

3.10 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

Generally, the notification and the registration of securities does not involve a significant amount of time. In order to register a deed or a court decision in the Land Registry or the Electronic Archive it usually takes a few days and the authentication of an immoveable mortgage agreement by a public notary usually takes a few hours. The fees payable in order to register the security is calculated proportionally with the value of the guaranteed asset, but is not a high-cost procedure.

3.11 Are any regulatory or similar consents required with respect to the creation of security?

In order to create a security, the articles of association of the company should mention the approval levels for a facility or a board decision on this matter can be issued.

As set out above for joint stock companies, if the security exceeds half of the book value of the company's assets at the date of conclusion of the legal act, the security may be granted only with prior approval of the general meeting of the shareholders.

3.12 If the borrowings to be secured are under a revolving credit facility, are there any special priority or other concerns?

There is no special priority in case of borrowings under a revolving credit facility. The guarantee structure is flexible, including mortgage guarantees on equipment, machinery and real estate.

3.13 Are there particular documentary or execution requirements (notarisation, execution under power of attorney, counterparts, deeds)?

See our answers above.

4 Financial Assistance

4.1 Are there prohibitions or restrictions on the ability of a company to guarantee and/or give security to support borrowings incurred to finance or refinance the direct or indirect acquisition of: (a) shares of the company; (b) shares of any company which directly or indirectly owns shares in the company; or (c) shares in a sister subsidiary?

(a) Shares of the company

According to the law, a company is allowed to acquire its own shares, either directly or through a person acting in his own name but on behalf of the company concerned, subject to the following conditions:

i) the approval of the acquisition of own shares is granted by the extraordinary general meeting of the shareholders, that shall determine the conditions of this acquisition, in particular the maximum number of shares to be acquired, the duration of the authorisation (that it may not exceed 18 months from the date of publication of the decision in the Official Gazette of Romania, Part IV), and, in the case of an acquisition by onerous title, their minimum and maximum value;

ii) the nominal value of own shares acquired by the company, including those already in its portfolio, may not exceed 10% of the subscribed share capital;

iii) the transaction may only deal with fully paid shares; and

iv) payment of the shares thus acquired shall be made only from the distributable profit or from the company's available reserves, entered in the last approved annual financial statement, except for the legal reserves.

If own shares are acquired for distribution to the employees of the company, the shares thus acquired must be distributed within 12 months from the acquisition date.

(b) Shares of any company which directly or indirectly owns shares in the company

The law provides that the subscription, acquisition or holding of shares in a joint-stock company by another company where the joint-stock company directly or indirectly holds the majority of the voting rights or whose decisions may be significantly influenced by the joint-stock company is considered to be carried out by the joint-stock company itself.

The provisions mentioned above shall also apply when the company through which the underwriting, acquisition or holding of such shares is performed is governed by the law of another State.

Moreover, a company may not make advances or loans or provide collateral security for the subscription or acquisition of its own shares by a third party. This provision shall not apply to transactions in current operations of credit institutions and other financial institutions.

Conclusion: in this situation, it is considered that the acquisition is carried out by the joint-stock company itself, thus the provisions under situation (a) are applicable, namely a company may not provide any financial assistance in the form of a loan, guarantee or security interest for the acquisition of its own shares as these ways of acquisition are not compliant with the four cumulative conditions provided above.

Moreover, loans or collateral security to a third party is expressly forbidden.

(c) Shares in a sister subsidiary

There is no financial assistance prohibition as such, but this type of transaction remains subject to the corporate benefit rules described above.

5 Syndicated Lending/Agency/Trustee/Transfers

5.1 Will your jurisdiction recognise the role of an agent or trustee and allow the agent or trustee (rather than each lender acting separately) to enforce the loan documentation and collateral security and to apply the proceeds from the collateral to the claims of all the lenders?

According to the provisions governing the mandate contract, the trustee can make conservation and administration acts (general mandate) and also disposition acts (special mandate – expressly empowered). Also, the mandate extends to all acts necessary for its execution, even if not expressly stated.

Moreover, according to the law, the administrators of a company are allowed to do all the operations required to carry out the object of the company's activity, except for the restrictions shown in the Articles of Incorporation.

The acts of disposition regarding the assets of a company may be concluded pursuant to the powers conferred to the legal representatives of the company, as the case may be, by law, by the Articles of Incorporation or by the decisions of the company's statutory bodies adopted in accordance with the provisions of the law and of the company's Articles of Incorporation. A special power of attorney in authentic form for this purpose is not necessary, even if the acts of disposition have to be concluded in authentic form.

The obligations and liability of administrators are governed by the provisions of the mandate contract and those specifically provided for by the law.

5.2 If an agent or trustee is not recognised in your jurisdiction, is an alternative mechanism available to achieve the effect referred to above which would allow one party to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

See answer at question 5.1 above.

5.3 Assume a loan is made to a company organised under the laws of your jurisdiction and guaranteed by a guarantor organised under the laws of your jurisdiction. If such loan is transferred by Lender A to Lender B, are there any special requirements necessary to make the loan and guarantee enforceable by Lender B?

The receivables assignment involves the transfer of one or more receivables from the primary creditor (acting as assignor) to a new creditor (acting as assignee) by means of a bipartite agreement, generally concluded between the creditors, while the assigned debtor is not even notified about this agreement. The consent of the debtor is required only when, as the occasion requires, the debt is essentially linked to the person of the creditor.

The receivables assignment transfers all the rights of the assignor relating to the assigned receivables and also the securities and all related accessories of the debt to the assignee. However, the assignor cannot transfer, without the consent of the pledger, the possession of the pledged asset to the assignee.

There are no special requirements necessary to make the loan and guarantee enforceable by the lender that took over the loan from the primary lender. However, the forms of publicity regarding the guarantees of the loans must be complied with.

6 Withholding, Stamp and Other Taxes; Notarial and Other Costs

6.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Revenue in the form of interest paid by the borrower to a foreign lender is 16% and will be withheld by the borrower from the moment when the interest is paid. The abovementioned tax may be different where double tax treaty or EU regulation is applicable.

Where a lender is enforcing a security against a debtor (borower or guarantor) he is not liable for any tax on proceeds of such a claim, except where the lender is a natural person.

6.2 What tax incentives or other incentives are provided preferentially to foreign lenders? What taxes apply to foreign lenders with respect to their loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

There are no tax incentives preferentially provided to foreign lenders.

With an *immovable mortgage*, the fee to be paid for its registration with the Land Book is composed of a fixed tax of RON 100 and a tax of 0.1% of the value of the secured receivable, acc. to Annex no. 1, point 2.3.3. of Order no. 39/2009 on the approval of tariffs for the services provided by the National Agency of Cadastre and Real Estate Advertising and its subordinated Units and authorisation fee for those who carry out specialised works of cadastre, geodesy and cartography.

With a *movable mortgage*, charges for signing the credit Agreement and the related guarantee in Electronic Archive for Secured Transactions are borne by customers.

Fees for guarantee notices were initially established in 2000, by art. 24 of GO 89/2000. The amount of taxes is updated by Government decision, depending on the official rate of inflation.

Thus, at present, the level of fees charged by Electronic Archive for Secured Transactions is of RON 67 for submitting an opinion.

6.3 Will any income of a foreign lender become taxable in your jurisdiction solely because of a loan to or guarantee and/or grant of security from a company in your jurisdiction?

A foreign lender in receipt of Romanian-source interest income would be liable to Romanian income tax, 222 and 223 (1) (b) of Romanian Fiscal Code except where double tax treaty or other EU regulations are applicable.

6.4 Will there be any other significant costs which would be incurred by foreign lenders in the grant of such loan/guarantee/security, such as notarial fees, etc.?

Except the cost for registration of the collateral security mentioned at question 6.2 above to create a valid mortgage over real estate, the agreement must be notarised, and notary fees can be quite significant, varying depending on the value of the secured amounts and the mechanism used for establishing the security. Where the loan agreement is not considered under its applicable law as being an executory title, the enforcement of the mortgages over real estate may raise problems.

The lenders will not be subject to such costs, whereas, according to the practice of the Romanian market, these costs are born by the borrower, nevertheless it is advisable that parties to reach to an agreement regarding the allocation of such costs.

6.5 Are there any adverse consequences to a company that is a borrower (such as under thin capitalisation principles) if some or all of the lenders are organised under the laws of a jurisdiction other than your own? Please disregard withholding tax concerns for purposes of this question.

No. However, on January 1st 2018, the applicable rules for deductibility of expenses were completely changed.

7 Judicial Enforcement

7.1 Will the courts in your jurisdiction recognise a governing law in a contract that is the law of another jurisdiction (a "foreign governing law")? Will courts in your jurisdiction enforce a contract that has a foreign governing law?

The Romanian Courts recognise the foreign law of a contract, but the internal legislation may raise some debates, in connection with this issue. In accordance with the Romanian Civil Procedural Code, in a case which has an extraneity element, the Court will apply the Romanian procedural regulation ("*forum regit processum*"), as a principle in accordance with art. 1088 Civil procedural Code. Nowadays, the majority of foreign civil international legislation is built in accordance with this principle, without admitting any waiver.

However, the qualification of an issue as being governed by the procedural rules or by substantial rules will be made in accordance with the internal legislation, excepting the legal entities that have no correspondence with Romanian bodies. Thus, the quality of the parties, the object and the scope of the claim will be set in accordance with the law that governs the merits of the dispute. The evidence and the evidence power of the document will be made in accordance with the law applicable to the Contract, whenever the law of the parties allows this.

In consequence, the Parties may choose any substantial law of the Agreement, but if they choose to commence legal proceedings in front of Romanian Courts, the Romanian Procedural laws will be applied. In the latest situation, the substantial law of the Agreement shall be used, excepting the aforementioned features.

Regarding a contract that has a foreign governing law, in accordance with EU Regulation no. 593/2008, on the Law applicable to Contractual obligations (Rome I) courts in Romania generally enforce such contracts, if these have jurisdiction for claims under such Contract.

7.2 Will the courts in your jurisdiction recognise and enforce a judgment given against a company in New York courts or English courts (a "foreign judgment") without re-examination of the merits of the case?

In this case, a distinction between the English Courts and the Courts in USA (namely New York Courts) should be made. In accordance

with the EU Council Regulation no. 1215/2012, on jurisdiction, enforcement of judgment in civil and commercial matters ("Regulation Brussels I recast), a ruling rendered in an EU Member State shall be recognised without any special proceedings in any other EU Member States, unless the recognition is challenged.

However, in accordance with art. 45 from the aforementioned Regulation, on the application of any interested party, the recognition of a judgment shall be refused: taking into consideration a few conditions stressed by this legal provision.

Regulation no. 1215 does not apply to judgments rendered by the NY Courts. In accordance with the Romanian Civil Procedural Code, foreign judgments are fully recognised in Romania (i) if they refer to the personal status of the citizens of the state where they were ruled or (ii) if they were ruled in a third State first recognised in the state of citizenship of each party or, if recognition have been rendered on the basis of the law determined as applicable under the Romanian private international law, are not contrary to the public order of Romanian private international law and the right to defence has been fulfilled. The rulings other than the ones mentioned in the first paragraph, may be recognised in Romania in order to benefit of "*res judicata*" (claim preclusion), if the following conditions are met cumulatively: a) the judgment is final according to the law of the state where it was rendered; (b) the court which ruled it had, under the law of the State of residence, jurisdiction to hold the proceedings without, however, being based exclusively on the defendant's presence or property not directly related to the dispute in the State in which that court is situated; or c) there is reciprocity regarding the effects of foreign judgments between Romania and the state of the court that ruled the judgment.

Also, if the judgment has been given in the absence of the party who has lost the case, it must also declare that the party concerned has been served in good time both with the summons for the substantive debate and with the referral of the court and that it was given the opportunity to defend itself and to appeal the decision.

Unless some prior conditions are met, the Court will not rule on the merits of the foreign ruling and will not proceed on amending it.

7.3 Assuming a company is in payment default under a loan agreement or a guarantee agreement and has no legal defence to payment, approximately how long would it take for a foreign lender to (a) assuming the answer to question 7.1 is yes, file a suit against the company in a court in your jurisdiction, obtain a judgment, and enforce the judgment against the assets of the company, and (b) assuming the answer to question 7.2 is yes, enforce a foreign judgment in a court in your jurisdiction against the assets of the company?

Firstly, we should make a distinction depending of the enforceable character of the agreement under discussion. If the contract is governed by Romanian law and the enforceable character is recognised, a claim submission won't be necessary and the contract shall be enforced in accordance with the Romanian Civil Procedural Code (as it will be stressed below). If the contract is governed by foreign law, an application in Court shall be necessary, in order to obtain a ruling and afterwards enforce it.

A foreign company may submit an application in front of the Romanian Courts in order to obtain a favourable ruling against a debtor which is in payment default. This application may take six months to one year, depending on the circumstances of the case, considering that the debtor has no legal defence.

After the ruling becomes definitive and all the appeals are ruled, a foreign lender will follow the enforcement procedure in front of a bailiff. This procedure may also take three months to one year depending on the assets that are executed. A seizure on the bank accounts may solve the debt recovery earlier than the execution of a real estate or mobile goods (that require a more complex procedure).

For example, in case of real estate enforcement, the bailiff will organise a public auction in order to sell the asset and recover the enforced amounts. The Creditor may choose to adjudicate the real estate on behalf of its receivable, if its economic reasons are in this respect.

Regarding the mobile goods, depending on their specifications, their enforcement requires the presence of the Police authorities in accordance with Article 659 Romanian Civil Procedural Code. Also, the enforcement of such assets will be considered as being performed, only after the bailiff identifies the goods, which is rather difficult. The possession document gives the creditor the right over those assets.

We should stress that if the foreign lender holds a letter of guarantee (even issued by a foreign bank) against the Romanian debtor, this instrument shall be enforced immediately by the bank at the first demand of the creditor, in accordance with the Paris Publication no. 758, related to the execution of such autonomous instruments. The only requirement in this respect is to indicate to the bank the contractual provision that was breached by the Romanian company.

7.4 With respect to enforcing collateral security, are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction, or (b) regulatory consents?

Regarding the enforcement of collateral securities, as mentioned above, this stage requires a procedure in front of a bailiff. After the registration of the enforcement submission, the bailiff shall request court approval for initiating the enforcement procedure. This approval is provided by art. 666 Romanian Civil Procedural Code. After the Courts grants this approval (the approval is based on form condition verifications), the executor will start the enforcement procedure: identify the debtor's assets (which are located in the bailiff's territorial division), transmit seizure letters to all the banks and try to identify if the debtor has mobile assets or real estate assets in the Land Book and with City Hall. Also, the bailiff may request Trade Registry information about the debtor's involvement in other companies, in order to seize these assets, also.

As mentioned at question 7.3, the real estate execution requires the organisation of a public auction, in accordance with the provisions of art. 846 Romanian Civil Procedural Code. The real estate selling advertisement will be published at the bailiff's office, at the City Hall where the asset is located and also at the executional Court. This advertisement is usually published in national newspapers, in order to insure an entire advertisement of the auction.

7.5 Do restrictions apply to foreign lenders in the event of (a) filing suit against a company in your jurisdiction, or (b) foreclosure on collateral security?

There are no specific restrictions applying to foreign lenders in case of submitting a court application against a company or foreclosure on collateral security.

It should, however, be noted that foreigners who submit claims in Romania should set a procedural headquarter in Romania for the communication of procedural documents (usually the lawyer's office). If they do not comply with this legal requirement, the Romanian Courts will communicate the procedural documentation by post and the post receipt submission will be considered the evidence of a legal summoning procedure.

Also, all foreign documentation submitted before the Romanian courts will be translated into Romanian language by an authorised translator.

7.6 Do the bankruptcy, reorganisation or similar laws in your jurisdiction provide for any kind of moratorium on enforcement of lender claims? If so, does the moratorium apply to the enforcement of collateral security?

According to the Romanian legislation from the date of the opening of the bankruptcy, reorganisation or similar proceedings, all judicial or extrajudicial claims against the insolvent/bankrupt debtor or any enforced execution proceedings are legally suspended. The main debt and all the penalties (contractual ones or legal interest) should be capitalised only by registering on the table of creditors. In this respect, the interested creditors may submit a registration petition to the judicial administrator/liquidator and in front of the insolvency court. This submission will show the amount of the receivable, its contractual and legal grounds. The judicial administrator/liquidator shall admit or dismiss the request of registration, depending on the grounds of the receivable. However, the creditor may challenge the liquidator/judicial administrator's decision in the insolvency Court.

The Romanian Insolvency Law stresses also that no interest, increase or penalty, collectively called 'accessories' will not be added to the receivables borne before the commencement of the insolvency procedure, excepting the situation of the guaranteed creditors (that hold a mortgage), which will be registered on the definitive Table of Creditors with the market value of the guarantee. This value will be set by a valuation report and in case the value resulting from the report will be higher than the initial amount registered on the table, the favourable difference will be distributed to the guaranteed creditor. This means that the Romanian legislation gives to the guaranteed creditors additional rights others than those applicable the rest of the creditors, participating at the insolvency procedure, in order to add securities to their guaranteed receivable.

Also, in case no reorganisation plan is confirmed, all the penalties, legal interest, additional expenses, borne after the initiation of the bankruptcy procedure will be paid in accordance with the contractual documentation and the payment chart of the reorganisation plan. In case the reorganisation plan shall fail, all the accessories will be owed by the debtor until the initiation of the insolvency procedure.

7.7 Will the courts in your jurisdiction recognise and enforce an arbitral award given against the company without re-examination of the merits?

According to the Romanian Civil Procedure Code, art. 1125, a foreign arbitral award shall be enforced in Romania if the dispute is not contrary to the public policy of international private law. The procedure is provided by arts. 1124–1134, of the Romanian Procedural Code.

At the same time, the Romanian Civil Procedure Code (art. 1065) stipulates the possibility of choosing the most favourable law ("*mitior lex*"): The New York Convention; or the Romanian Civil Procedure Code.

In other terms, the grounds for dismissing the recognition or the enforcement of the awards are identical in both normative acts because the Romanian Civil Procedure Code takes over the provisions of art. 5 of the New York Convention.

According to the Civil Procedure Code, in order to enforce the foreign arbitral awards, an application approval of the execution shall be submitted to the Tribunal, attaching the said award the arbitral convention translated in Romanian and over-certified by the Consulate. There is no requirement of a prior exequatur decision, in order to address an application for declaration of enforceability. We should also stress that the aforementioned procedure is also called the exequatur procedure but this does not imply the involvement of a judicial executor (bailiff). This could have led to a confusion of terms.

Anyway, the Romanian Court shall only verify some prior procedural issues and will not argue the merits of the arbitral award.

8 Bankruptcy Proceedings

8.1 How does a bankruptcy proceeding in respect of a company affect the ability of a lender to enforce its rights as a secured party over the collateral security?

According to the Insolvency Law, from the opening date of the insolvency proceedings, all judicial, extrajudicial actions or enforcement measures for recovering any receivables against the debtor's assets are suspended.

The lenders can recover their claims, but only within the insolvency proceedings by submitting an application for receivables acceptance with the competent court and abiding by special rules provided under this procedure.

However, under the security held, the lender becomes a secured creditor and has certain preferential rights in the insolvency proceedings for the satisfaction of his claim.

8.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g., tax debts, employees' claims) with respect to the security?

According to the insolvency law, certain claims have priority over a creditor's secured claim, in the following order:

- Taxes, stamps and any other fees incurred with respect to the sale of the respective secured asset.
- Receivables of utility services providers arising after the opening of the insolvency proceedings.
- Remuneration of the judicial administrator.
- Receivables of other secured creditors relating to the same secured asset if these arose during the insolvency proceedings.

Creditors granted with security over an asset have priority over that asset or the equivalent value of that asset, with the observance of the aforementioned limitations.

If, by selling the asset, the amounts do not cover the value of the debt, for the difference in value, the creditors have an unsecured receivable that comes in competition with other receivables, in the following order:

- Fees, stamps or any other expenses related to the insolvency procedure.
- Claims resulting from financing granted during the insolvency proceeding.
- Labour-related claims.
- Claims arising from the debtor's activity after the opening of the insolvency proceedings.
- Fiscal claims.
- Receivables representing amounts owed by the debtor to third parties under alimony obligations.
- Receivables representing amounts established by the syndic-judge for supporting the debtor and their family, if the debtor is a natural person.

- Receivables representing banking loans, with accrued expenses and interest, resulting from product delivery, services or rents.
- Other unsecured claims.
- Subordinated claims, in the following order:
  - receivables of third parties that have acquired or sub-acquired in bad faith the debtor's goods, as well as the loans provided to the legal person debtor by a shareholder holding at least 10% of the share capital or voting rights in the general meeting of shareholders or by a member of the economic interest group; and
  - receivables resulting from gratuitous acts.

Where more creditors are granted the same security interest over the same asset, the priority is determined by reference to the moment the publicity formalities were performed (that is, registration with the Land Book or with the Electronic Archive for Secured Transactions).

Therefore, on registration with the relevant public registry, the respective security interest ranks before the claims of any unsecured creditors and of the creditors holding subsequently registered security interests in respect of the same asset.

Where two or more creditors have the same priority rank, the sums are distributed proportionally by reference to the sum relating to the receivable of each such creditor.

8.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

According to the law, the insolvency procedure does not apply to public institutions, individuals, professionals who practice liberal professions (e.g. lawyers, doctors, architects, assistants, executors, experts, pharmacists) and to professionals who are subject to special provisions regarding their insolvency regime.

Also, the insolvency procedure is not applicable to the pre-university and university education units and institutions, as well as to the entities stipulated in art. 7 of the Government Ordinance no. 57/2002 on scientific research and technological development.

Persons performing liberal professions are liable civilly and disciplinary for the damages caused in the exercise of their profession, according to special normative acts that regulate organisation and exercise of the respective profession.

Government Emergency Ordinance no. 46/2013 on the financial crisis and the insolvency of territorial-administrative units establishes the general framework and collective procedures for covering liabilities of the administrative-territorial units in the financial crisis or in insolvency.

Also, starting with January 1st, 2018, the Insolvency Law of Individuals (personal bankruptcy) entered into force.

8.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of a company in an enforcement?

In our legal system, the only creditors who can seize the assets of a company without court intervention are public institutions, the most common situation being the seizure insured by the Public Finance Administration for the recovery of tax liabilities owed by taxpayers to the state.

However, the Civil Code provides certain alternative enforcement measures for the creditors, such as: a) the possibility to temporarily take over mortgaged assets, for administration purposes, until the claims are satisfied; and b) the possibility to appropriate the asset in order to extinguish the receivable, under certain conditions provided by the law.

Also, if the lender holds an enforcement title as defined by the Romanian Law (exchange bills, promissory notes, credit agreements under Romanian substantial law), it can easily be enforced, since the enforcement court intervention is purely a formal one, the Court having the sole obligation to endorse forced execution in a non-contentious proceeding. After the writ of execution is given, the bailiff can take any and all the necessary measures for seizing the company's assets.

9 Jurisdiction and Waiver of Immunity

9.1 Is a party's submission to a foreign jurisdiction legally binding and enforceable under the laws of your jurisdiction?

In Romania, a contractual choice of forum is generally permissible and legally binding. Certain form requirements may apply. However, the choice of forum is not valid if it leads to the abusive deprivation of the protection provided by a Romanian court to one of the parties. Also, if other courts have exclusive jurisdiction, no choice of forum is permissible.

9.2 Is a party's waiver of sovereign immunity legally binding and enforceable under the laws of your jurisdiction?

A waiver of sovereign immunity from jurisdiction is generally legally binding, on the condition that the waiver is authorised by law or by international conventions to which Romania is a party. Also, the legal entities governed by public law having economic activities in their field of activity are able to conclude arbitration agreements, unless the law or their act of incorporation provides otherwise.

10 Licensing

10.1 What are the licensing and other eligibility requirements in your jurisdiction for lenders to a company in your jurisdiction, if any? Are these licensing and eligibility requirements different for a "foreign" lender (i.e. a lender that is not located in your jurisdiction)? In connection with any such requirements, is a distinction made under the laws of your jurisdiction between a lender that is a bank *versus* a lender that is a non-bank? If there are such requirements in your jurisdiction, what are the consequences for a lender that has not satisfied such requirements but has nonetheless made a loan to a company in your jurisdiction? What are the licensing and other eligibility requirements in your jurisdiction for an agent under a syndicated facility for lenders to a company in your jurisdiction?

In Romania, a company could become a lender following the authorisation of its activity by the National Bank of Romania (NBR). An entity which carries out banking activities on a regular basis in Romania must either be duly licensed as a creditor institution or as a financing company, or non-banking financial institution.

Also, a company can grant loans to other company, occasionally, but without doing it with professional title. In this case, the Romanian law provides that these companies are not subject to the legal provisions on credit institutions.

A creditor institution must have its own funds or a level of initial share capital that cannot be less than EUR 5 million. During the operation of the creditor company, the share capital must not fall below this level, otherwise the NBR may close its activity.

In order to obtain the approval, the applicants shall submit to the NBR a plan of activity, including the types of activities to be carried out and the organisational structure and showing the ability to achieve their objectives under a prudent and healthy banking practice.

Regarding the structure of the creditor, the company must have a rigorous management framework which includes processes to identify, manage, monitor and report the risks to which it is or might be exposed, adequate internal control mechanisms, including administrative and accounting procedures, rigorous policies and remuneration practices, which promote and agree with healthy and effective risk management.

The management of the creditor shall be provided by, at least, two people with good reputations and adequate banking experience.

The licensing and eligibility requirements for creditors in Romania are also applicable to credit institutions in other countries, with the following specifications:

Credit institutions authorised and supervised by the competent authority of **a Member State** may be considered as creditors **by the establishment of branches** or **by the provision of services directly**, if those activities are covered by the authorisation granted by the competent authority of the country of origin.

A credit institution from another Member State may carry out activities directly in Romania, pursuant to European Directive no. 2013/36 / EU and European Regulation no. 575/2013, if authorised by the competent authority of the Member State.

A credit institution authorised in a Member State, may set up a branch in Romania or provide services directly on the basis of the notification sent to the National Bank of Romania by the competent authority of the country of origin.

A credit institution in **a third country** can only operate in Romania by setting up a branch in Romania authorised by NBR. The initial capital of the branch may not be lower than the EUR 5 million.

In Romania, both non-banking financial institutions (NFI) and banks are regulated. The main differences are as follows:

a) NFI may grant credits but cannot attract deposits. This last activity can only be done by credit institutions.

b) NFIs are divided into two categories: NFIs registered in the Special Register of the National Bank; and those entered only in the General Register. In order to be part of the first category, non-bank financial institutions must meet certain capital criteria, the amount of credits granted, total assets.

c) In order to receive an authorisation from the NBR, a bank must prove that it has an initial minimum capital of EUR 5 million.

d) A non-bank financial institution shall have a share capital of only EUR 200,000, or EUR 3 million in the case of NFIs granting mortgages.

Non-compliance with such banking rules may lead to the criminal liability. According to the Romanian law, it constitutes an offence and it is punished by imprisonment from one to five years.

The Romanian legislation does not contain provisions on syndicated facilities.

11 Other Matters

11.1 Are there any other material considerations which should be taken into account by lenders when participating in financings in your jurisdiction?

Yes, there are any other material which should be taken into account by lenders when they are participating in financings and this is the establishment of personal insolvency for Romanian individuals.

The Personal Insolvency Law was inspired by the legislation applicable to the insolvency of natural persons in the EU and aims to offer Romanian citizens similar rights (and obligations) as the majority EU Member States recognise when their EU citizens declare insolvency.

The Personal Insolvency Law creates the legal framework for insolvency of individuals, i.e. a procedure of declaring insolvency of individuals aimed at offering possibilities to natural persons to (partially) clean their debts, under certain conditions set out by the Personal Insolvency Law. There are three different insolvency procedures, applicable depending on the particular situation of the individual:

- insolvency procedure based on a debt repayment plan (upon request of the individual);
- insolvency procedure based on asset liquidation (either at the request of the individual or of his/her creditors); and
- simplified insolvency procedure (applicable to individuals who lost over 50 per cent of their work capacity or qualify for standard retirement).

The relevant bodies which will apply the insolvency procedure for individuals are the insolvency commission (a new administrative body which will be established for the purposes of the personal insolvency of individuals), the insolvency administrator or liquidator and the courts.

While the banking industry is generally fine with the compromise solution enacted under the Personal Insolvency Law, it is still to be seen to what extent individuals will try to abuse the newly introduced benefits.

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Valentin Trofin holds a Bachelor Law Degree (1998) and a Master Degree in International Commercial Arbitration (2014), both from Law School of University of Bucharest. He also holds a Diploma in International Commercial Arbitration from Chartered Institute of Arbitrators (2014). Valentin Trofin is a PhD candidate at the Doctoral Law School of Titu Maiorescu University.

Valentin Trofin was admitted to the Bucharest Bas Association (1999), The National Association of Authorized Romanian Valuers (2003) and to the Romanian National Union of the Insolvency Practitioners (2010). He was admitted to the Fellowship of Chartered Institute of Arbitrators, being a member of the European Branch's Executive Comitee. Also, he is member of International Bar Association, Society of Construction Law (UK), Romanian Society of Construction Law and founding member and Treasurer of Bucharest Arbitration Network.

Valentin Trofin is recognised as a leading practitioner in the construction industry and real estate development, mergers & acquisition and international arbitration. Valentin Trofin's multidisciplinary qualification as a lawyer, real estate appraiser and business appraiser provides him with quick and better business understanding followed by the ability to render innovative solutions for each case.

Valentin Trofin's business acumen, passion for technicalities and details and great negotiation skills makes him as a "most needed person" for all complex cases. When he is assigned to draft a bespoke agreement, his outstanding drafting skills will deliver a well-structured agreement with a combination of plain and minimum legal language resulting in an easy to understand agreement smartly dealing with all the risks involved. These skills combined with his business understanding is long tested and in every case the results were the same: no disputes were referred to courts for resolution.

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Mihaela has been an Associate with Trofin si Asociatii since 2016.

Mihaela Spiridon graduated from University of Bucharest – Faculty of Law in 2014, holds a Master's Degree in Business Law from Nicolae Titulescu University and is also a speaker of English and French and was admitted to the Bucharest Bar Association in 2015.

Her work includes providing general advisory assistance regarding various business aspects and she also works as part of the internal team in an investment arbitration case handled by the International Centre for Settlement of Investment Disputes of Washington involving major privatisation, insurance/reinsurance and insolvency issues.

Since joining the team, Mihaela has been involved in a variety of transactional and non-transactional real estate and commercial matters, including legal due diligence investigations, construction projects, preparing and negotiating various agreements.

She has also been involved in drafting and negotiating finance documents and the corresponding security packages, as well as due diligence analyses in this respect. On this note, she advised a consortium of investors in relation to the potential participation on the development of a real-estate project consisting of building and selling a number of buildings. She also advised and assisted a construction company in the acquisition of a land plot of approx. 46,000 sq. m. in Romania, in view of a future office and storage development thereon.

Her experience covers land acquisitions, urbanism and construction matters, including FIDIC contracts, leasing and operational aspects for office. In addition, Mihaela is actively assisting clients on diverse corporate housekeeping operations and on general contracts and commercial legal aspects.

She also provided legal advice to economic operators acting as bidders in public procurement procedures, in connection with the submission of complaints and defence before the National Challenge Resolution Council, supplying legal assistance and representation during the settlement of complaints.

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Trofin & Asociatii was founded in March 2003 as a boutique law firm specialised in construction industry and corporate law. Immediately after that, in 2004 the firm became well known for its professionalism and leading voice in construction projects and real estate development. Since then, their practice has increased and they are now experienced in mergers and acquisition, intellectual property, employment law, real estate development, insurance claims, banking & finance, public procurement, international commercial or investment arbitration and domestic litigation.

Since 2003, Trofin & Associates had been involved in more than 50 construction or real estate development projects with values ranging from Euro 10 million to Euro 70 million.

Since 2007, the firm was involved in many cross-border transactions especially in Turkey, Russian Federation, North Africa and Republic of Moldova. The firm has a great deal of experience in dispute resolution, including international commercial arbitration being involved in more than 30 cases of domestic and international arbitration.

Every year the firm's dispute resolution practice is involved in representing clients in more than 70 litigation and arbitration cases on average, with a peak in 2009–2012 when they were involved in more than 200 litigation and arbitration cases each year.

In 2016, the Romanian Government appointed them, as co-counsel, to represent Romania in an investment arbitration in a dispute of hundreds of millions of Euros under the rules of ICSID Washington D.C. (U.S.A).

The lawyers in our firm have a strong academic background being frequent speakers at workshops and international conferences.