

The Romanian Insolvency Publication and Registration Requirements under Article 21 and Article 22 of the European Insolvency Regulation

Ioan Chiper

Lawyer

Miculiti Chiper Shollenbarger (M.C.S.A.) Angelo S.C.P.A.

48 Lascar Catargiu Blvd.

BUCHAREST 010673

Romania

www.mcsa.ro

ioan.chiper@mcsa.ro

1 Preliminary considerations

1.1 Background and terminology

1.1.1 Background

Romania's insolvency legislation is comprehensive, and its provisions regarding insolvent liquidation and reorganization are largely consistent with international standards. The insolvency law is civil law based, influenced generally by the previous Commercial Code of Romania (which had roots in the Italian law) and German law, but also has elements from the US Bankruptcy Code.

Romania has a statutory legal system and case law is only a non-binding (yet persuasive) secondary source of law. The legal regime is comprised of a combination of different types of legislation (*i.e.*, Acts enacted by the Parliament; Ordinances, Emergency Ordinances, and Resolutions issued by the Government; Orders issued by various ministers and heads of Government agencies; European Directives, and European Regulations) drawing its content from different origins both local and international. The Romanian law applies throughout the country with no exceptions.

1.1.2 Terminology

Under Romanian law, the terms “**bankruptcy**” (in Romanian: *faliment*) and “**insolvency**” (in Romanian: *insolvență*) have the same meanings. However, more recently, “**insolvency**” has started to be used on a more frequent basis.

Under previous legal enactments regulating the “insolvency procedure,” the term “**bankruptcy procedure**” encompassed both (i) restructuring proceedings and (ii) liquidation proceedings, the latter being inadequately and unfortunately called “**the bankruptcy stage – debtor’s liquidation**,” which created a public perception of bankruptcy as the commencement of the end, and, consequently, a general stigma has been cast upon the businesses running through bankruptcy proceedings.¹

1.2 Main legislation governing insolvency and restructuring in Romania

There are several pieces of statutory legislation that address the insolvency process in Romania, as follows:

- (a) Insolvency Act No. 85/2006, as subsequently amended (the “**Insolvency Act**”);²
- (b) International Insolvency Act No. 637/2002, as subsequently amended (the “**International Insolvency Act**”);³

¹ See Act No. 64 dated 22 June 1995, published in Official Gazette of Romania No. 1066, dated 17 November 2004 (repealed in 2006).

² See Act No. 85 dated 5 April 2006, published in Official Gazette of Romania No. 359, dated 21 March 2006, as subsequently amended.

- (c) Government Emergency Ordinance No. 86/2006 on Insolvency Practitioners, as subsequently amended (the “**Insolvency Practitioners Law**”);⁴
- (d) Government Resolution No. 460/2005 on the contents, stages, financing conditions, the publication and distribution of the Insolvency Proceedings Bulletin, as subsequently amended (“**Resolution 460**”);⁵
- (e) Order No. 1187/2005 of the Romanian Minister of Justice on the Procedure of communicating procedural acts, supporting documents and information therein among courts, insolvency judges, judicial administrators and liquidators, and the National Trade Register Office, for purposes of facilitating the publication of the Insolvency Proceedings Bulletin (“**Order 1187**”);⁶
- (f) Order No. 1692/C/2006 of the Romanian Minister of Justice on the format of the Insolvency Proceedings Bulletin and the contents of summons, communications, court decisions, subpoenas, notices and other procedural acts that are published therein, as well as of the proof of service of such procedural acts, as subsequently amended (“**Order 1692**”);⁷
- (g) Order No. 520/C/2007 of the Romanian Minister of Justice on the fees chargeable for the publication in the Insolvency Proceedings Bulletin of the procedural documents issued by judicial administrators and liquidators (“**Order 520**”);⁸ and
- (h) Order No. 521/C/2007 of the Romanian Minister of Justice on the fees chargeable for providing copies of the Insolvency Proceedings Bulletin, certified copies of the procedural acts published, and of information from, the Insolvency Proceedings Bulletin (“**Order 521**”).⁹

1.3 Additional legislation

Apart from the general insolvency legislation, Romania has enacted a number of special purpose insolvency legislative acts and regulations. These provide special insolvency regimes over certain assets, over certain entities and over certain companies operating in particular industries.¹⁰

1.4 Cross-border insolvency legislation

Cross-border insolvency matters are governed in Romania by International Insolvency Act, in effect since 1 July 2003, which implements to a large extent the UNCITRAL Model Law.¹¹ In addition, the EU Insolvency Regulation has become directly applicable to Romania since Romania’s accession to the EU on 1 January 2007.¹²

For various reasons, however (including historical and geopolitical), Romania has had limited exposure to cross border insolvency issues and proceedings. Thus, there is still little, if any, court practice on the subject.¹³

³ See Act No. 637 dated 7 December 2002, published in Official Gazette of Romania No. 931, dated 19 December 2002, as subsequently amended.

⁴ See Government Emergency Ordinance No. 86/2006, published in Official Gazette of Romania No. 944, dated 8 November 2006, as subsequently amended.

⁵ Government Resolution No. 460 dated 19 May 2005, published in Official Gazette of Romania No. 474, dated 3 June 2005, as subsequently amended.

⁶ Published in Official Gazette of Romania No. 807, dated 06 September 2005.

⁷ Published in Official Gazette of Romania No. 615, dated 17 July 2006.

⁸ Published in Official Gazette of Romania No. 141, dated 27 February 2007.

⁹ *Idem*.

¹⁰ The examination of this additional legislation, which supplements or supplants those listed above, exceeds the stated purpose of this Memorandum and is, thus, not covered herein.

¹¹ International Insolvency Act is complemented in Romania by the provisions of International Private Law Act No. 105/1992.

¹² International Insolvency Act purports to regulate solely those cross-border insolvency aspects involving a jurisdiction other than that of any member of the EU (such as the US), and also including Denmark. In contrast, the applicability of the EU Insolvency Regulation in Romania is limited to cross-border insolvencies involving jurisdictions of EU Member States, except Denmark.

¹³ Providing a summary of the court interpretation of Romanian cross-border insolvency laws and principles becomes, therefore, a task that is far from easy. One can only assume that, absent any prior case law guidelines, the Romanian courts, in interpreting both the International Insolvency Act, which acknowledges its international origin, and the EU Insolvency Regulation, will most likely look for assistance into the foreign courts’ practice. Courts may find further interpretative relief in the provisions of the International Private Law Act for determining several aspects.

2 Publication procedures in Romania for giving notice of the opening of insolvency proceedings¹⁴

2.1 Date of commencement of insolvency proceedings

Under Insolvency Act, whether an insolvency petition is a “**voluntary petition**” (*i.e.*, it is filed by the debtor or its management), or an “**involuntary petition**” (*i.e.*, it is filed by other person or entity than the debtor or its management), the insolvency proceedings are formally commenced when the insolvency court issues a decision declaring the insolvency of a debtor and commencing insolvency proceedings against such debtor (the “**decision opening insolvency proceedings**” or “**DOIP**”).¹⁵

Notably, in a voluntary petition context, the date of filing such petition by a debtor does not coincide with the commencement date.¹⁶

The time of commencement is particularly important in the context of linking certain consequences to such date and also setting several procedural time limits, including *inter alia* for giving public notice of the commencement of such proceedings.

2.2 Publication procedures relating to the filing of an insolvency petition

As pointed out at § 2.1. (Date of commencement of insolvency proceedings) above, the date of filing an insolvency petition does not coincide with the date of commencement of insolvency proceedings.

2.2.1 Voluntary insolvency petitions

Insofar as the filing of a voluntary insolvency petition, no publication or registration formalities are currently required upon or after the filing of such a petition.

2.2.2 Involuntary insolvency petitions

Within 48 hours of the lodging of an involuntary insolvency petition with the court, a copy of such petition should be notified to the debtor.¹⁷ No other publication or registration formalities need be currently effectuated upon or after the filing of such a petition.

2.3 Publication procedures for giving notice of the opening of insolvency proceedings

Where a voluntary petition is filed, the insolvency court of competent jurisdiction is bound to adjudicate the petition within five (5) days of such petition *in camera*.¹⁸

If an involuntary petition is filed, it usually takes longer for a insolvency court to declare the insolvency of the debtor, as the debtor often challenges such petition. The particular timeframe depends on a series of factors, including court backlogs and judicial holiday seasons. Consequently, a two to three month period is customary for a debtor to be declared insolvent in an involuntary insolvency proceeding, but longer periods are often encountered in practice.

If a insolvency court addresses a voluntary or involuntary insolvency petition and resolves to declare the insolvency of a debtor and to commence insolvency proceedings against such debtor, there are certain publication, registration and service (*i.e.*, notification) formalities that the law requires to be completed, as follows:

- (i) A DOIP handed down as a result of a voluntary insolvency petition shall be **served**, in a form that would include certain other relevant information, on the debtor, on all creditors identified in the list such debtor provides the insolvency court with, and, in case of debtors that are listed companies, also on the National Securities Commission in Romania;¹⁹

¹⁴ For purposes of this Memorandum, the meaning of the term “**publication**” is limited to its narrow sense, *i.e.* the advertising of a certain event in a public database and /or in a newspaper.

¹⁵ See Insolvency Act, Arts. 32(1), 33(4), and 33(6).

¹⁶ Insolvency Act has thus not followed the previous approach of the 1887 Romanian Commercial Code, which used to acknowledge the date of the filing with the court of an insolvency petition as the commencement date of the proceedings.

¹⁷ See Insolvency Act, Art. 33 (1).

¹⁸ See Insolvency Act, Art. 27 (5).

¹⁹ See Insolvency Act, Art. 7(4) and Art. 61(1). If any of the creditors have authorized service agents residing or domiciled in Romania, the notification shall be served mandatorily on such agents to their residence or domicile in Romania.

All data required to be disclosed where serving a DOIP are reflected in Resolution 460.²⁰

- (ii) A DOIP referenced at (i). immediately above shall also be subject to mandatory **publication** in (1) a national journal and (2) the Insolvency Proceedings Bulletin;²¹

Order 1692 approved three formats of a DOIP,²² taking account of whether such DOIP:

- (a) has been issued in response to a voluntary petition;²³
- (b) has been handed down in response to an involuntary petition uncontested by the relevant debtor;²⁴ or
- (c) has been handed down in response to an involuntary petition that has been unsuccessfully challenged by the relevant debtor.²⁵

A DOIP shall be communicated to the Insolvency Proceedings Bulletin both in hardcopy and electronic format.²⁶

- (iii) A notification of a DOIP referenced at (i). immediately above shall be **registered** with the trade register, farm register, and/or any other registries where such debtor is registered, with any public registries, books, records, etc. where debtor's real or personal property or any interest therein is subject to recordation for valid creation, perfection or notice purposes (*e.g.*, land books, ship or aircraft registries, Electronic Archive for Security Interests in Personal Property, Central Securities Depository), and, if the case, on the debtor's website.²⁷

The notification of the DOIP to the relevant trade register shall be made pursuant to the rules set down in Methodological Norm of 10 October 2008 on trade registries, registrations with trade registries and disclosure of information from trade registries, issued by the Minister of Justice, and particularly those of Title II, Chapter VII.²⁸

3 Practical steps that a liquidator from another Member State should take to arrange for publication in Romania of a notice under Art 21(1) of the EU Insolvency Regulation

3.1 Background

Art. 21(1) of the EU Insolvency Regulation vests a liquidator with the power of requesting that notice of the judgment opening insolvency proceedings in an EU Member State and, where appropriate, the decision appointing him, be published in any other Member State in accordance with the publication procedures provided for in that State.²⁹ Such publication shall also indicate the liquidator that has been appointed and whether the jurisdiction rule applied is that pursuant to Article 3(1) or Article 3(2) of the EU Insolvency Regulation, *i.e.*, whether such insolvency proceedings are main proceedings or, conversely, secondary proceedings.³⁰

Furthermore, Art. 21(2) permits EU Member States to require, if desirable, that such publication be mandatory to the extent the debtor maintains an establishment in such States, in which case the liquidator or any other authority empowered for that purpose in the main proceedings shall take all appropriate steps to ensure such publication.

²⁰ See Resolution 460, Art. 5.

²¹ See Insolvency Act, Art. 61(3)

²² All these formats, as well as any other similar approved format, are available (only in Romanian) online for free download at <http://www.buletinulinsolventei.ro/index.php?pagina=formulare>

²³ See Order 1692, Exhibit 2.3.

²⁴ See Order 1692, Exhibit 2.4.

²⁵ See Order 1692, Exhibit 2.5.

²⁶ See Order 1187, Subsection 1.1. of the Procedure.

²⁷ See Insolvency Act, Art. 45 (2¹) and Art. 63.

²⁸ Published in the Official Gazette No. 704 of 16 October 2008. The relevant forms are available (only in Romanian) online for free download at http://www.onrc.ro/romana/formulare.php#table_3 (see, in particular, Form No. 11-10-184, applicable for filing inter alia relevant court orders with trade registers).

²⁹ For purposes of EU Insolvency Regulation, the term "**liquidator**" includes "any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs". See EU Insolvency Regulation, Art.2 (b).

³⁰ *Idem*.

3.2 Formalities for publication in Romania of a DOIP handed down in another EU Member State

None of the various pieces of main and secondary legislation governing the publication formalities in Romania for DOIPs seem to particularly address the publication in Romania of DOIPs issued in other EU Member States (or non-EU jurisdictions, for the same purpose), or any relevant requisite formalities for such purpose. In practice, though, the publication for such non-Romanian DOIPs occurs at the request of liquidators in other EU Member States, and we have been advised by officials with the Insolvency Proceedings Bulletin that if such request exists, the formalities required for the publication of Romanian DOIPs are applicable accordingly to the publication of DOIPs issued in other EU Member States.³¹

Similarly, liquidators may consider, in addition to publication in the Insolvency Proceedings Bulletin, the publication in a national journal in Romania of DOIPs issued in other EU Member States. In that scenario, the publication requires direct contact with the relevant publisher of a suitable national journal.

Although there are currently no clear rules or guidelines as to whether a liquidator planning to effect the publication in Romania of a DOIP handed down in another EU Member State needs to accompany her request with supporting documentation, one may assume that providing such supporting documentation would facilitate the process to a significant extent. Hence, a liquidator should consider incorporating into an application calling for such publication the main contents of the relevant DOIP,³² along with a Romanian translation thereof, and also attaching to such application:

- (i) a copy of the proof of the liquidator's appointment, along with
- (ii) a Romanian translation of such copy.³³

4 Particular rules regarding publication in Romania of notices of the opening of insolvency proceedings in another Member State, in accordance with Art 21(2) in a situation where a debtor maintains an establishment in Romania

Publication in Romania of a relevant DOIP issued in another EU Member State is currently not mandated under Romanian insolvency rules, irrespective of whether a relevant debtor maintains an establishment in Romania.

A liquidator appointed in insolvency proceedings in another EU Member State may, however, directly effectuate such publication in Romania pursuant to the provisions in Art.21(1) of the EU Insolvency Regulation, and the relevant *publication* procedures referenced at § 2.3 (ii) (Publication procedures for giving notice of the opening of insolvency proceedings) above shall apply accordingly.

5 Public registers (e.g., land register, trade register) in Romania in which a judgment opening main insolvency proceedings may be registered

5.1 Background

Art. 22 (1) of the EU Insolvency Regulation provides a liquidator in insolvency proceedings commenced pursuant to Art. 3(1) of the EU Insolvency Regulation with the authority of requesting that the DOIP issued in an EU Member State pursuant to that Article 3(1) be registered in any other EU Member State in the relevant land registers, trade registers, and any other public register.

Furthermore, Art. 22(2) permits EU Member States to require, if desirable, that such registration be mandatory.

5.2 Formalities for registration in Romania of a DOIP handed down in another EU Member State pursuant to Art. 3(1) of EU Insolvency Regulation

5.2.1 Categories of registers

³¹ See § 2.3. (ii) (Publication procedures for giving notice of the opening of insolvency proceedings) in this Memorandum for a review of such formalities.

³² See Par. (29) of the Recitals to the EU Insolvency Regulation.

³³ See EU Insolvency Regulation, Art.19 paras. (1) and (2). The Romanian translation needs not be legalized or subject of other similar formality.

One can contemplate two categories of public registers kept in Romania that a liquidator may chose, or even may have to, if required, to register a DOIP handed down in another EU Member State pursuant to Art. 3(1) of EU Insolvency Regulation, *i.e.*:

- (i) Registers where a debtor and/or its establishments must be recorded for purposes of meeting the requisite personal status publication formalities under various Romanian business or non-profit organization laws (a “**status register**”). Such registers include:
 - (a) the trade register;
 - (b) the farm register; or
 - (c) the register of non-profit organizations and foundations
- (ii) Registers where a debtor’s property, either real or personal, or any rights or interest therein are subject to registration as evidence of title, or for valid creation, or perfection thereof, or for notice purposes (a “**property register**”). Such registers include:
 - (a) the land book;
 - (b) the Electronic Archive of Security Interests in Personal Property;
 - (c) the Ship Register;
 - (d) the Aircraft Register;
 - (e) the securities register kept by the Romanian Central Depository;

Under Romanian law, irrespective of whether a debtor is registered in Romania in a status register, a DOIP needs to be always registered, in principle, with a property register kept in Romania if a debtor owns property that is subject to registration in that property register. A DOIP handed down in an EU Member State pursuant to Art.3 (1) of EU Insolvency Regulation would, thus, in principle, require its registration in any of the property registers in which property of a debtor is subject to such registration.

Conversely, Romanian law does not mandate registration in a status register in Romania of a DOIP handed down in a EU Member State pursuant to Art.3 (1) of EU Insolvency Regulation save for limited circumstances, *e.g.* where a debtor’s registered office is located in Romania or if a debtor whose registered office is located outside Romania maintains an establishment in Romania in the form of a branch (in Romanian: *sucursală*), as such term is defined under Romanian Companies Act No. 31/1990, as subsequently amended.³⁴ If a debtor does not maintain such an establishment in Romania, a publication in a Romanian trade register upon the request of a liquidator may be unlikely to occur due to practical reasons (*i.e.*, status registers in Romania can only generate registrations for entities or structures that have an active registration role in such registers).

5.2.2 Registration with a property register

If a debtor against which a DOIP is handed down in an EU Member State owns property that is subject to registration in any property register that is kept in Romania, such as those listed under § 5.2.1. (Categories of registers) above, such DOIP will, in principle, be subject to mandatory registration in any such relevant register, pursuant to the relevant rules governing a registration of that type.

6 Practical steps that a liquidator from another EU Member State should take to arrange for registration in Romania under Art 22(1) of a judgment opening main insolvency proceedings in another EU Member State

6.1 Registration in property registers

There are currently no particular rules under Romanian law governing the registration in a property register in Romania of a DOIP handed down in another EU Member State to distinguish such from the registration of a DOIP issued in Romania.

³⁴ See Companies Act, Art. 43 (1). Such circumstances will be examined under Section 7 of this Memorandum, below.

In practice, the liquidators in other EU Member States should request the registration of such non-Romanian DOIPs directly to the authorities or entities maintaining or operating the relevant property registers, and the formalities required for the registration of Romanian DOIPs should be applicable accordingly to the registration therein of DOIPs issued in other EU Member States.

6.2 General considerations

Not unlike the formalities for publication in Romania of DOIPs handed down in other EU Member States, there are currently no clear rules or guidelines as to whether a liquidator planning to effect the registration in Romania, in a property register or a status register, of a DOIP handed down in another EU Member State needs to accompany her request with supporting documentation. One may assume, however, that providing such supporting documentation would facilitate the process to a significant extent. Hence, a liquidator should consider incorporating into an application calling for such registration the main contents of the relevant DOIP, along with a Romanian translation thereof, and also attaching to such application:

- (i) a copy of the proof of the liquidator's appointment, along with
- (ii) a Romanian translation of such copy.

7 Particular rules regarding mandatory registration in Romania under Art 22(1) of a judgment opening main insolvency proceedings in another EU Member State in a situation where a debtor maintains an establishment in Romania

Whenever a debtor maintains its registered office in Romania, or where it maintains an establishment in Romania in the form of a branch, a DOIP handed down against such debtor must be registered in the relevant status register where the registered office and/or the branch are registered. Such rule similarly applies in the context of a DOIP handed down in another EU Member State.³⁵

A liquidator must request the registration with the relevant trade register in Romania of a DOIP handed down against such debtor in Romania or another EU Member State within 15 days of the issuing of such DOIP.³⁶ ⊕

³⁵ See Act No.26/1990 on Trade Register, Art. 21(f) and Art.24(4) a).

³⁶ See Act No.26/1990 on Trade Register, Art. 22(1).