

Insolvency & Restructuring - Romania

Considering insolvency clawback risks

Contributed by **Musat & Asociatii**

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Transactions subject to challenge

Term for filing cancellation claim

Consequences of successful cancellation claim

According to Insolvency Law 85/2006, the judicial administrators, liquidators or creditors' committee of a company subject to an insolvency procedure are entitled to claim the cancellation of certain transactions concluded before the opening of the insolvency procedure. The applicable period varies from 120 days to two or three years before the opening of the insolvency procedure, depending on the type of transaction in question.

Transactions subject to challenge

The following transactions may be challenged within the insolvency procedure:

- fraudulent acts concluded by the debtor to the detriment of creditors' rights in the three years before the opening of the insolvency procedure;
- transfers performed free of charge during the three years before the opening of the insolvency procedure, with the exception of humanitarian sponsorships;
- transactions concluded during the three years before the opening of the insolvency procedure in which the debtor's performance substantially exceeds the counter-performance of the other party;
- transactions concluded during the three years before the opening of the insolvency procedure in which the intention of all parties involved was to conceal assets from other creditors or injure them in any other way;
- ownership transfers in favour of a creditor that were made within the 120 days before the opening of the insolvency procedure for the purpose of covering a prior debt, provided that the amount that the creditor would have obtained in case of the debtor's bankruptcy is less than the value of the transfer;
- creation of a real security (eg, mortgage or pledge) during the 120 days before the opening of the insolvency procedure for the purpose of securing a debt that had been unsecured;
- early repayment of debts performed during the 120 days before the opening of the insolvency procedure, provided that their maturity was set for a date after the opening of the procedure;
- transfer of deeds or assumption of obligations by the debtor during the two years before the opening of the insolvency procedure with the intention of hiding or delaying insolvency, or to defraud a person or entity to which it was (or subsequently became) debtor at the date of transfer of derivatives transactions (including carrying out bilateral netting agreements under qualified financial contracts);
- operations concluded by the debtor with shareholders holding at least 20% of the share capital or voting rights, administrators, directors, members of supervising bodies or any other persons holding a dominant position over the debtor or its business, if such operations were damaging creditors' rights.

However, the law provides that the cancellation of transactions described in the fifth, sixth and seventh points listed above cannot be claimed if such transactions were concluded by the debtor in good faith based on an arrangement with its creditors (following extra-judicial negotiations for debt restructuring), provided that such arrangement was likely to lead to the debtor's financial recovery and was not intended to cause prejudice towards or discriminate against creditors.

Furthermore, according to the law, the cancellation of a patrimonial transfer made by the debtor in the ordinary course of its business cannot be claimed.

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Term for filing cancellation claim

The cancellation claim may be filed within one year of the expiry of the term established by the court for the judicial administrator to prepare the so-called 'causal report'. In any case, this can be no later than 16 months from the opening of the insolvency procedure.

Consequences of successful cancellation claim

If the court allows the cancellation claim, the assets transferred under the invalidated operations or the assets' value (if such assets are missing) must be returned to the debtor's patrimony for the benefit of all creditors.

The counterparty to the invalidated transfers (ie, the acquirer) that makes such a return will be entitled to participate in the insolvency procedure as an unsecured ordinary creditor for the value of such assets, provided that it participated in the initial transfer in good faith and without intention to prevent, delay or mislead the creditors. In bad-faith cases, the third party is entitled to no restitution and loses the receivable in favour of the debtor's patrimony.

If the assets that were subject to the initial transfer were subsequently sold to a third party (ie, a sub-acquirer), the sub-acquirer may be obliged to return the assets or their value only if it did not pay the price for the acquired assets and it knew or should have known that the initial transfer was likely to be cancelled.

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