

## Client Brief

**BANKING & FINANCE**

**JUNE 2014**

### **NEW ROMANIAN PRE-INSOLVENCY AND INSOLVENCY LAW**

#### **INTRODUCTION**

On 24 June 2014, the President of Romania has promulgated the new Pre-insolvency and Insolvency Law, which had been passed by the Chamber of Deputies on 15 April 2014 and found constitutional by the Romanian Constitutional Court on 21 May 2014.

The Pre-insolvency and Insolvency Law is now pending publication with the Official Gazette and will enter into force within three days as of such publication.

As of the date of its entry into force, the new law, which applies to ordinary corporations, credit institutions and insurance companies, will repeal *inter alia* Law no.85/2006 on insolvency proceedings, Law no. 381/2009 on preventive composition and ad-hoc mandate, Government Ordinance no.10/2004 on the bankruptcy of credit institutions, certain parts of Law no. 503/2004 on the financial turnaround, bankruptcy, dissolution and voluntary liquidation in the insurance business and Law no. 637/2002 on private international law relations in the field of insolvency.

#### **IMPROVED ROMANIAN CLOSE-OUT NETTING REGIME**

Leroy si Asociatii is pleased to having contributed together with ISDA to the changes that the Pre-insolvency and Insolvency Law currently includes with respect to the Romanian close-out netting regime, marking significant progress in this area.

Romania benefits today of a reinforced and clearer close-out netting regime applicable across various types of counterparties, ordinary corporations and financial institutions included.

Amongst the issues we have discussed with the legislator and which were reflected in the Pre-Insolvency and Insolvency law, we would like to point out the following:

### 1. Fundamental Principles

In line with the UNIDROIT Principles on the Operation of Close-out Netting Provision, the Pre-insolvency and Insolvency Law recognises as one of its fundamental principles, *the need of reducing credit risk and systemic risk associated with financial derivatives transactions by recognizing the enforceability of close-out netting provisions in the context of the counterparty's pre-insolvency and insolvency, having as a consequence the reduction of the credit risk to a net amount due between the parties, or even to zero where collateral has been transferred to cover the net exposure.*

### 2. New financial contracts falling under the safe-harbour regime

The scope of a “*qualified financial contract*”, which initially included financial derivatives operations only, is now extended to also cover *repurchase and reverse repurchase agreements, buy-sellback and sell-buyback agreements and securities lending agreements*, based on the reasoning that such agreements qualify as financial contracts, being commonly entered into by financial markets' participants.

### 3. Protection in a pre-insolvency context

The Pre-insolvency and Insolvency Law clearly states that the provisions allowing the syndic-judge to impose the postponement of claims against creditors which are not signatories of a preventive composition arrangement are not applicable in respect of *qualified financial contracts and bilateral netting operations.*

### 4. Clarification of the scope of provisions dealing with the nullity of contractual clauses providing for the termination of ongoing contracts by reason of opening of the insolvency proceeding

The Pre-insolvency and Insolvency Law specifically exempts *qualified financial contracts and bilateral netting arrangements from the provisions dealing with the nullity of contractual clauses providing for the termination of ongoing contracts by reason of opening of the insolvency proceeding.*

### 5. Clarification of the scope of provisions dealing with pecuniary debts of the bankrupt debtor becoming automatically due as of the date of the opening of the bankruptcy proceedings

The Pre-insolvency and Insolvency Law specifically exempts *qualified financial contracts and bilateral netting arrangements from the provisions dealing with pecuniary debts of the bankrupt debtor becoming automatically due as of the date of the opening of the bankruptcy proceedings.*

### 6. Harmonisation of close-out netting regime for ordinary corporations, credit institutions and insurance companies

Aside from reinforcing and clarifying the Romanian close-out netting regime, the Pre-insolvency and Insolvency Law further *harmonises the safe-harbour regimes applicable to Romanian corporations, credit institutions and insurance companies, by applying the same set of rules for all types of counterparties.*

## 7. Cross-border insolvency provisions

Last but not least, the Pre-insolvency and Insolvency Law ensures a consistent cross-border insolvency treatment in line with the relevant European legislation, making clear reference to the application of the *law governing the respective contract* in relation to contractual set-off and ***bilateral netting arrangements***, by exception from the principle that the opening of a bankruptcy procedure with respect to a Romanian credit institution or a Romanian insurance company is governed by Romanian law.

If you are interested in receiving further information on this topic, please do not hesitate to contact us.

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