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# ROMANIAN BANKRUPTCY LAW: A CENTRAL EUROPEAN EXAMPLE

Samuel L. Bufford\*

## I. INTRODUCTION

Romania now has one of the best-drafted bankruptcy<sup>1</sup> laws<sup>2</sup> in Central and Eastern Europe. The new Romanian bankruptcy law went into effect on August 26, 1995, and replaced the previous bankruptcy provisions in §695-971 of the Romanian Commercial Code,<sup>3</sup> which was translated from the Italian Commercial Code of 1884 and enacted in 1887. While the commercial code fell into disuse during the Communist era, it was never repealed.<sup>4</sup> After the Romanian revolution and the demise of Nicolae

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1. "Bankruptcy" is a word whose meaning varies around the world and even in central Europe. In the United States, it refers to the federal law providing for the reorganization or liquidation of the financial affairs of businesses and individuals. See 11 U.S.C. §101-1330 (1994). In Romania, it refers to the liquidation of businesses and merchants, but not to reorganizations. Law No. 64 Concerning the Proceeding of Judicial Reorganization and Liquidation (1995) [hereinafter Law No. 64]. In Hungary, in contrast, "bankruptcy" refers to the reorganization of businesses, but not their liquidation. Law 1L on Bankruptcy Procedures, Liquidation Procedures and Final Settlement, ch. II. Yet another meaning is found in Australia, where it refers to the liquidation of the assets of individuals, but not of business entities. In this article, the United States' meaning will be used.

2. Law No. 64; For a discussion of the legal and economic background of bankruptcy law in Central and Eastern Europe countries (including Romania), see Samuel L. Bufford, *Bankruptcy Law in Countries Emerging from Communism: The Special Legal and Economic Challenges*, 70 AM. BANKR. L. REV. 459 (1996).

3. Codul Comercial, May 10, 1887, with modifications of 1895, 1900, 1902 and 1906 [hereinafter Commercial Code] (Rom.).

4. Similarly, the 1864 Romanian Civil Code (a translation of the Napoleonic Code adopted in France in 1804) was also not repealed during the Communist era, but mostly fell into disuse. See John Van Doren, *Romania: Ripe for Privatization and Democracy?*

Ceașescu at the end of 1989, the commercial code as well as the civil code remained good law, and needed only to be reprinted (they had been out of print for half a century) and applied by the Romanian courts.<sup>5</sup> While these laws needed substantial modernization, at least there was a body of law for the Romanian courts to apply while the legislature was preparing modernization legislation.

There are two trial level courts in Romania, the Municipal Court and the Tribunal.<sup>6</sup> In general, the larger and more important cases are filed initially in the Tribunal, and the smaller cases begin in the Municipal Court.<sup>7</sup> All bankruptcy cases begin in the Tribunals.<sup>8</sup> With few exceptions, the Tribunal judges begin their judicial careers in the Municipal Courts, and move up after they gain a measure of experience.<sup>9</sup>

With these general observations in mind, I address the specific questions raised in the hypothetical posed for this symposium.

## II. RELIEF FROM INDEBTEDNESS

Like the United States bankruptcy law, the Romanian bankruptcy law provides for both reorganization and liquidation.<sup>10</sup> Reorganization is a new concept in Romanian law. Liquidation, in contrast, has existed under the commercial code since 1887.<sup>11</sup>

Any single creditor with an unpaid, due and owing claim may file an involuntary petition against a debtor who has discontinued payments for a period of at least thirty days.<sup>12</sup> The refusal to pay a debt because of a good faith dispute does not constitute a suspension of payments.<sup>13</sup> The regional Chamber of Commerce and Industry may also file an involuntary bankruptcy petition against a debtor.<sup>14</sup>

After an involuntary bankruptcy petition is filed, the court<sup>15</sup> must,

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*Legal Education as a Microcosm*, 18 HOUS. J. INT'L L., 113, 132 (1995).

5. *Id.*

6. *Id.* at 138.

7. CARANA - THE RECOVERY GROUP, *CEE REGIONAL BANKRUPTCY PROJECT 8* (American Bar Association Central & East European Law Initiative, 1996).

8. *Id.* at 2.

9. *Id.* at 8.

10. Law No. 64, art. 2.

11. Commercial Code, ch. III.

12. Law No. 64, art. 24(1).

13. *Id.* art. 24(2).

14. *Id.* art. 24(3).

15. Where the Romanian statute refers to "the court," the decision must be made by the

within 48 hours, forward to the debtor and the regional Chamber of Commerce and Industry a copy of the petition and must have a copy posted at the court entrance.<sup>16</sup> The debtor has five days to contest the opening of a bankruptcy case.<sup>17</sup> If the debtor contests the petition, the court summons the petitioning creditors, the debtor and the regional Chamber of Commerce and Industry to a hearing to determine whether a case should be opened.<sup>18</sup> If the court finds that the debtor is in a situation of suspension of payments to its creditors, the bankruptcy case must be opened.<sup>19</sup> However, the simple refusal to pay particular debts based on good faith grounds does not constitute suspension of payments.<sup>20</sup>

While the determination of the opening of the case is pending, the debtor may make a motion to require the petitioning creditor to post a bond in a commercial bank of up to 30% of the value of all claims against the debtor, to cover the debtor's damages in case the petition is rejected.<sup>21</sup> If a case is opened, the bond is returned to the petitioning creditor.<sup>22</sup> If the bond is not posted, the case is dismissed.<sup>23</sup>

Like bankruptcy petitions in the United States,<sup>24</sup> the petition in Romania specifies whether the relief sought is reorganization or liquidation.<sup>25</sup> Unlike the United States statute, the Romanian statute does not provide for the conversion of a reorganization to a liquidation (except after the failure to confirm a plan within the statutory period),<sup>26</sup> or vice versa. Thus, it is not clear whether an involuntary liquidation petition can be converted to a reorganization on the motion of the debtor or another party in interest.

Relief from indebtedness is difficult to negotiate in Romania apart from the bankruptcy process. There is a rather low level of bank debt,

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Tribunal pursuant to its ordinary rules and procedures. In contrast, the syndic judge (who is a member of the Tribunal) is given substantial powers and responsibilities under the Romanian statute that are largely administrative in nature. *Id.* art. 10(1)(a)-(k).

16. *Id.* art. 25.

17. *Id.* art. 26(1).

18. *Id.*

19. *Id.* art. 26(3).

20. *Id.* art. 24(2).

21. *Id.* art. 26(2).

22. *Id.*

23. *Id.*

24. See Official Bankr. Form No. 1, 11 U.S.C.A. (1995).

25. No. 64, art. 21(1)(f).

26. See *infra* text accompanying notes 60-63.

because the banks have been only minor players in the economy since the fall of Communism, and few retail banks existed during the Communist era.<sup>27</sup> A major portion of the debt is owed by governmental enterprises, which have been unable to settle their accounts for a number of years. These debts cannot be worked out, because the government is prohibited by statute from compromising debts: only a court order can alter the amount claimed by a government-owned creditor. Thus, bankruptcy relief may be the only way to restructure a business in the typical case where a substantial portion of the debt is owed to government enterprises.

Two features of the Romanian bankruptcy law particularly impact the debtor and creditors at the outset of a case. First, like the United States law,<sup>28</sup> the Romanian bankruptcy law imposes an automatic stay of all debt collection efforts on creditors.<sup>29</sup> This stay begins with the filing of a voluntary petition. Unlike United States practice, however, it does not apply upon the filing of an involuntary petition: it begins only when the time to appeal a decision to open a case has become non-appealable, or when an appeal has been rejected.<sup>30</sup>

A second noteworthy provision in the Romanian law is that it adopts the United States concept of a bankruptcy estate, a distinct entity that exists only while the bankruptcy case is pending.<sup>31</sup> The debtor's estate, under Romanian law, includes all of the debtor's property, and includes property obtained during the course of a bankruptcy case, if it is subject to execution under the Romanian Code of Civil Procedure.<sup>32</sup>

Thus, a bankruptcy case for Heavy Duty is likely to be filed by creditors in Romania, and is likely to be a liquidation case. It is not clear whether it can be converted into a reorganization case, once it is filed as a liquidation.

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27. It would be quite unusual in Romania to find a business with half of its debt that is secured or that is owed to a bank. On commercial credit ability, see Bufford, *supra* note 2, at 470-71.

28. See 11 U.S.C. § 362 (1994).

29. Law No. 64, art. 31.

30. *Id.*

31. *Id.* art. 3.

32. *Id.*

### III. THE PLAYERS IN THE ROMANIAN BANKRUPTCY SYSTEM

Under the Romanian bankruptcy law, the dominant player in the bankruptcy process, both reorganization and liquidation, is the syndic judge.<sup>33</sup> The syndic judge's responsibility is a new assignment that the chief judge of the Tribunal gives to existing Tribunal judges.<sup>34</sup>

The powers of the syndic judge are very extensive. The syndic judge calls the meeting of creditors,<sup>35</sup> applies seals to all of the debtor's property within 48 hours of the filing of the case,<sup>36</sup> makes an inventory of all the debtor's assets,<sup>37</sup> appoints experts<sup>38</sup> and coordinates their work,<sup>39</sup> objects to claims and monitors the settlement of them,<sup>40</sup> analyzes the debtor's business to determine whether it should be reorganized or liquidated,<sup>41</sup> and markets the assets.<sup>42</sup> Most important, it is the syndic judge who keeps the funds of the estate, pending their distribution to creditors.<sup>43</sup>

The syndic judge also appoints a committee of three to five creditors to advise the judge during the course of the case.<sup>44</sup> This committee must be approved by the court and serves without compensation.<sup>45</sup>

There is a political history behind the granting of such extensive powers to the syndic judges. Because the Ceaușescu regime, during the last half of the Communist era, was extremely repressive, the Romanians developed a deep distrust for government authorities.<sup>46</sup> Furthermore, the revolution at the end of 1989 was fairly limited: in addition to Ceaușescu and his top cabinet ministers, only the secret police was removed; the

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33. *See id.* art. 10. The syndic judge has been adopted from a French model, and was a vestigial position in the Romania judiciary prior to its adoption in the new bankruptcy law.

34. Law No. 64, art. 8.

35. *Id.* art. 10(1)(c).

36. *Id.* art. 10(1)(a).

37. *Id.* art. 10(1)(b).

38. *Id.* art. 9.

39. *Id.* art. 10(1)(e).

40. *Id.* art. 10(1)(f).

41. *Id.* art. 10(1)(h).

42. *Id.* art. 10(1)(j).

43. *Id.* art. 10(1)(i).

44. *Id.* art. 15.

45. *Id.* art. 15(1).

46. Van Doren, *supra* note 4, at 124-25; Bufford, *supra* note 2, at 479.

remainder of the government stayed in place.<sup>47</sup> Furthermore, it was largely the former secret police who became the leaders of the private sector.<sup>48</sup> Thus, neither the public sector nor the private sector offered good candidates to trust with the safekeeping of large sums of money, while preventing corruption in the administration of bankruptcy estates. The judiciary was the only notable exception. In consequence, the judiciary has been given unusual powers in the Romanian bankruptcy system.

Unlike United States law, it is the assembly of creditors rather than the committee that exercises power on the creditor's behalf.<sup>49</sup> An assembly of creditors is convened within thirty days of the filing of a voluntary bankruptcy, or within twenty days of the opening of an involuntary bankruptcy case.<sup>50</sup> The syndic judge presides over the meeting of creditors.<sup>51</sup> Creditors have the power to vote on sales of property,<sup>52</sup> and to hire an administrator to manage the debtor's business.<sup>53</sup> The administrator must be a certified public accountant, a lawyer or an economist, and must have five years of experience in the profession.<sup>54</sup> Furthermore, the creditors may be authorized to pursue avoidance actions.<sup>55</sup>

In a reorganization case under Romanian law, as under United States law,<sup>56</sup> the debtor remains in possession.<sup>57</sup> Subject to court approval, the assembly of creditors makes the decision on whether the debtor's management should be dispossessed, and an administrator appointed to take over the management of the business.<sup>58</sup>

Very few bankruptcy cases were filed in Romania before the new bankruptcy law took effect. Before that time, Romanian lawyers complained that Romanian judges tended to consider bankruptcy cases as two-party disputes, and to be unsympathetic to a collective debt-collection process to resolve such a dispute. Since the adoption of the new

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47. Van Doren, *supra* note 4, at 115.

48. See David Binder, *Police Were Fewer than Romanians Feared*, N.Y. TIMES, June 13, 1993, S1, at 8.

49. Law No. 64, art. 13.

50. *Id.* art. 28.

51. *Id.* art. 13(4).

52. *Id.* art. 14.

53. *Id.* art. 17.

54. *Id.*

55. *Id.* art. 16(2).

56. See 11 U.S.C. § 1107 (1994).

57. Law No. 64, art. 67.

58. *Id.* arts. 17, 18.

bankruptcy law, there have been a number of new bankruptcy cases filed. Most of them apparently are liquidation cases, rather than reorganizations. While the Romanian statute provides for both voluntary and involuntary cases, apparently voluntary cases are rare.

Because most Romanian bankruptcy cases have only been filed recently, the courts, legal counsel and the other players have rather little experience beyond the beginning stages of bankruptcy cases. Most of the bankruptcy cases are still pending, except for the involuntary cases that have been dismissed on the debtor's opposition to opening a case.<sup>59</sup>

#### IV. CONFIRMING A PLAN OF REORGANIZATION

The process for proposing and confirming a plan of reorganization in Romania is somewhat similar to that in the United States. The statute provides a sixty-day period in which a plan must be proposed.<sup>60</sup> The sixty-day period runs from the date of filing of a voluntary petition, and from the date of expiration of the right to appeal or the date of rejection of an appeal in an involuntary case.<sup>61</sup> The syndic judge has the power to extend the sixty-day period for an additional ninety days.<sup>62</sup> If a plan of reorganization is not proposed within the time limit, or a plan is voted down, the case is converted to a liquidation.<sup>63</sup>

Unlike in the United States, the debtor does not have an exclusive right to propose a plan of reorganization in Romania.<sup>64</sup> In addition to the debtor, shareholders who collectively hold one-third of the shares of stock may propose a plan, and creditors who collectively hold one-third of the debt may likewise propose a plan of reorganization.<sup>65</sup> Partners of a partnership may also propose a plan.<sup>66</sup>

Romanian law provides a statutory classification of claims for voting purposes under a plan. The statute provides for four classes, who are permitted to vote on the plan.<sup>67</sup> In addition to a class for unsecured debt,

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59. Law No. 64, art. 24(1).

60. *Id.* art. 55(4).

61. *Id.*

62. *Id.*

63. *Id.* art. 60.

64. *Id.* *But cf.* 11 U.S.C. § 1121(b) (1994) (debtor has 120 days exclusive period to propose a plan under United States law).

65. Law No. 64, art. 55(1).

66. *Id.*

67. *Id.* art. 63(4).



a class is required for all secured debt.<sup>68</sup> However, if a secured creditor holds more than ten percent of the outstanding debt, that secured creditor must be separately classified.<sup>69</sup> Finally, the employees are separately classified.<sup>70</sup> An unimpaired class is presumed to vote in favor of the plan, and its members do not vote.<sup>71</sup>

To qualify for confirmation, a plan must be voted upon by a majority in interest of at least two classes, including at least one impaired class.<sup>72</sup> Voting is counted only according to the amount of debt each creditor holds; unlike United States law,<sup>73</sup> there is no requirement that a majority in number of creditors in any class approve the plan.<sup>74</sup>

Approval of a plan of reorganization under Romanian law is essentially a cramdown process, rather like the process under § 1129(b) of the United States bankruptcy law.<sup>75</sup> An affirmative vote of every class is not required, and a plan is confirmable notwithstanding a negative vote by two of the four statutory classes.<sup>76</sup> Like United States law, administrative expenses must be paid at the time of confirmation of the plan absent consent of an administrative creditor to be treated differently.<sup>77</sup>

Romanian law has a requirement that a plan be fair and equitable.<sup>78</sup> This includes a requirement that each class receive as much as it would receive in the liquidation of the business, that no class or creditor be over-compensated, and that each member of a class be treated equally, absent consent to a different treatment.<sup>79</sup> There is, in addition, an absolute priority rule for plans under Romanian law.<sup>80</sup> Unlike United States law, the plan must meet these requirements even for creditors who vote in favor of the plan.<sup>81</sup>

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68. *Id.* art. 63(4)(a) & (b).

69. *Id.*

70. *Id.* art. 63(4)(c).

71. *Id.* art. 63(6).

72. *Id.* art. 64(1).

73. 11 U.S.C. § 1126(c) (1994) (requires that a majority in number of a class vote in favor of a plan to constitute an accepting class).

74. Law No. 64, art. 63(6).

75. *See* 11 U.S.C. § 1129(b) (1994).

76. Law No. 64, art. 64.

77. *Id.* art. 65(3).

78. *Id.* art. 64.

79. *Id.*

80. *Id.*

81. Law No. 64, art. 64(1)(b). *But cf.* 11 U.S.C. § 1129(a)(7)(A)(ii) (1994).

This is the process that Heavy Duty must go through if it is to confirm a reorganization plan under Romanian law.

### V. LIQUIDATION PRIORITIES

The list of priorities in a liquidation under Romanian law is somewhat different from that in the United States. The creditors are divided into eleven priority classes, which are set forth in Articles 106 and 107.<sup>82</sup>

Article 106 basically provides a priority for secured debt. However, it provides two super-priorities, the first for the payment of expenses of sale of a particular asset, and the second for post-petition financing from a bank.<sup>83</sup> Unlike the United States system, which authorizes a super-priority security interest for a creditor providing post-petition financing only if financing is not available on any other basis,<sup>84</sup> this priority is mandatory in Romanian law.<sup>85</sup> Subject to these super-priorities, secured creditors with real property are entitled to be paid from their security.<sup>86</sup>

Article 107 provides for the non-secured creditor priorities. The first priority level is for the expenses of experts appointed by the syndic judge, and for fees, duty stamps, and other court costs.<sup>87</sup> The second and third level priorities apply only to individual debtors (merchants).<sup>88</sup> The second priority is for any unpaid debts for food and maintenance for the debtor during the six months before the bankruptcy case was filed,<sup>89</sup> and the third priority is for the maintenance necessary for the debtor, his wife<sup>90</sup> and his children as approved by the court.<sup>91</sup>

Employees enjoy the fourth level of priority in Article 107, which is fairly generous: they are entitled to their wages for a period up to six

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82. Law No. 64, arts. 106 and 107.

83. *Id.* art. 106(1) and (2).

84. *See* 11 U.S.C. § 364(d)(1) (1994).

85. Law No. 64, art. 106(2).

86. *Id.* art. 106(3).

87. *Id.* art. 107(1).

88. *Id.* art. 107(2) and (3).

89. *Id.* art. 107(2).

90. Apparently the Romanian bankruptcy law contemplates that the individual merchants who will qualify for bankruptcy will be men. However, in my judgment this priority would also benefit the male spouses of female merchants who may file bankruptcy as well. This judgment is largely based on the fact that some sixty percent of Romanian judges are women, and those that I have met would not likely tolerate a sexist interpretation of this statute.

91. Law No. 64, art. 107(3).

months before the case was filed.<sup>92</sup> The fifth priority is for claims arising from the post-petition commercial operations of the debtor.<sup>93</sup> This includes any non-bank credit extended during a reorganization, and any credit extended during a liquidation.<sup>94</sup>

The sixth level of priority is for the remaining administrative expenses, including current and necessary expenses for the preservation of the debtor's estate, fees and expenses for its management, and trade debt.<sup>95</sup> The seventh level of priority is for general unsecured claims,<sup>96</sup> and the final level of priority is for late-filed claims.<sup>97</sup> Finally, any remaining assets are returned to the owners.<sup>98</sup>

The legislature has very recently disturbed the priority hierarchy by enacting Ordinance No. 11 of 1996,<sup>99</sup> which provides that taxes take priority over all other claims, including administrative claims, and apparently over secured claims as well.<sup>100</sup> Notably, the priority hierarchy gives no priority for taxes.<sup>101</sup> A question of interpretation immediately arises: an ordinance is not supposed to take priority over a statute, and thus the interpretation of the priority it purports to give to taxing authorities is problematic. It is uncertain how Romanian judges will resolve this interpretive difficulty.

Thus, in a liquidation of Heavy Duty, perhaps the government would be paid first its unpaid taxes in the amount of one million dollars. After that, the banks would probably receive a substantial portion of the assets. They would receive the sales price of the real property carried on the books at three million dollars (at cost, after adjustment for inflation), subject to a cap of five million dollars, the amount owing to them. To the extent that they are not fully compensated, their remaining claims would be paid with the general unsecured creditors as a seventh level priority.

The next level of priority payment would be the payment of experts hired by the syndic judge, and fees, duty stamps and other court costs, the

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92. *Id.* art. 107(4).

93. *Id.* art. 107(5).

94. *See id.*

95. *Id.* art. 107(6).

96. *Id.* art. 107(7).

97. *Id.* art. 110.

98. *Id.* art. 115.

99. Romanian Ordinance No. 11 (1996). (available with the author) [hereinafter Ordinance No. 11].

100. *Id.*

101. Law No. 64, arts. 106 and 107.

amount of which is unknown from the hypothetical. Because there are no second or third priority debts, the next level to be paid would be the portion of the \$250,000 owing to the employees and retirees that represents unpaid wages (up to a maximum of six months of salary). Amounts owing to employees for other purposes appear not to be payable as a priority. Next in line is the payment of the post-petition commercial operations of the debtor, also in an unknown amount. Then the remaining administrative expenses would be paid; and finally, the remainder would be paid to the general unsecured creditors (including any undersecured amount owing to the banks).

It is uncertain how the unknown and unliquidated environmental claim would be treated under Romanian bankruptcy law: this mirrors an uncertainty under United States law. Neither statute provides at all for environmental claims, and it is not surprising to expect unpredictable results. Romania has some severe environmental problems, principally resulting from industrial pollution from factories installed during the Communist era.<sup>102</sup> The Soviets, whose economic power dominated the region, are known for their dirty factories: they dumped industrial pollutants with little regard to how they might impact people or businesses in the future.<sup>103</sup> So it was in Romania. The Romanians have not yet figured out how to deal with this legacy, and this uncertainty is reflected in the bankruptcy law.

If the proper procedural steps are taken, a Romanian court would probably give Heavy Duty a reasonable opportunity to reorganize. I have taught two week-long seminars for Romanian judges sponsored by the United States Agency for International Development (under a master contract with Deloitte & Touche) on the business and accounting information that judges need to administer reorganization cases. The judges have generally shown a greater inclination to permit the attempt at a reorganization than my colleagues in the United States, given a particular set of facts. Indeed, this is true throughout Central and Eastern Europe. Given a hypothetical designed to present a clear case of a business that was not reorganizable (based on an actual failed reorganization in Hungary), virtually all of the Central and East European judges who have attended

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102. See Richard B. Lillich, Dr. Christopher M. Teaf, Donna Holshouser Stinson, William Green, and Richard D. La Belle III, *Environmental Dilemmas Facing Eastern Europe and the Former Soviet Union; Transcript of the 9th Annual Conference of the National Association of Environmental Law Societies Panel on International Environmental Law*, 5 J. TRANSNAT'L L. & POL'Y 475, 489 (1996).

103. *Id.*

some twenty seminars in this program (including three seminars in Romania) have made the judgment that the business was reorganizable.

## VI. TREATMENT OF SECURED CREDITORS

Secured creditors receive somewhat less protection under Romanian bankruptcy law than they do under United States law. In part, this is because the Roman law tradition, now followed in virtually the entire non-English speaking world, does not protect property rights in the same manner as the United States Constitution.<sup>104</sup>

As in the United States, secured creditors are subject to the automatic stay resulting from the filing of a bankruptcy case.<sup>105</sup> The Romanian law provides no procedure for obtaining relief from this automatic stay, but one need not necessarily conclude that it is not available.

Secured creditors enjoy a third level priority in liquidation, junior only to the costs of sale and priming by bank financing during a reorganization.<sup>106</sup> However, the recently enacted Ordinance No. 11 may give taxing authorities higher priority than secured creditors.<sup>107</sup>

In a reorganization, a secured creditor does not have the power to block a plan.<sup>108</sup> Because the Romanian reorganization law essentially provides for the cramdown of a plan of reorganization, a secured creditor may be crammed down over its objection.<sup>109</sup> The secured creditor must receive as much in a reorganization as it would in a liquidation.<sup>110</sup>

Finally, Romanian bankruptcy law provides no adequate protection of a secured creditor's interest while a bankruptcy case is pending. However, interest continues to accrue on the secured portion of a secured creditor's debt while a case is pending;<sup>111</sup> if the creditor is undersecured, the

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104. U.S. CONST. The fifth amendment provides that no person shall be deprived of property by federal action without due process of law, or have private property taken for public use without just compensation. *Id.* amend. V. The fourteenth amendment provides similar protection against any state action. *Id.* amend. XIV.

105. Law No. 64, art. 31.

106. *Id.* art. 106(3).

107. *See* Ordinance No. 11.

108. Law No. 64, art. 64.

109. *Id.*

110. *Id.* art. 64(1)(b).

111. Law No. 64, art. 104(1).

conversion to a liquidation terminates the accrual of interest on the unsecured portion of the debt.<sup>112</sup>

## VII. EXPOSURE TO PERSONAL LIABILITY FOR MANAGERS

It appears that there is substantially higher risk of personal liability for a business's manager arising from its bankruptcy in Romania than there is under United States law. One of the first items of business under the Romanian bankruptcy statute is the preparation of a report within the first thirty days on the causes of insolvency, and the determination of who are the responsible parties.<sup>113</sup> Presumably this report will be given to the prosecutors, so that they can determine whether appropriate criminal actions should be brought.

The Romanian criminal code also has a provision on bankruptcy crimes. While the provisions are fairly similar to those in the United States law, it is possible that they can be enforced very differently from enforcement under the United States statutes.

The Romanian bankruptcy law has a long list of acts that may give rise to personal liability in a business bankruptcy case.<sup>114</sup> Perhaps the hardest one to avoid is the provision imposing personal liability on any manager who directs the making of a preferential payment to a creditor within one month prior to the insolvency of the debtor.<sup>115</sup> The avoidance of this liability requires managers to predict in advance when a debtor will become insolvent, and this may happen long before the bankruptcy case is filed. Indeed, it appears that a substantial portion of Romanian businesses are presently insolvent, and that the managers of all of those that are eligible for bankruptcy may be exposed to this personal liability at the present time. The real problem with this provision is that it imposes personal liability on a manager who is trying to do a good job of managing the business. Personal liability, in contrast, should be limited to those circumstances where the manager has not acted appropriately.

The second provision that might be interpreted to impose unexpected liability on a manager who is trying to act in the best interest of the business is the provision that imposes personal liability for using "disastrous methods" to raise funds to keep the business going.<sup>116</sup> The

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112. *Id.*

113. *Id.* art. 35.

114. Law No. 64, art. 123(1)(a)-(g).

115. *Id.* art. 123(1)(g).

116. Law No. 64, art. 123(1)(f).

“disastrous method” language is not defined in Romanian bankruptcy law, and it appears that it has no fixed meaning in Romanian law. This leaves a lot of opportunity for a court to second guess management efforts taken in good faith to keep a business going.

Several other grounds for personal liability arising out of a bankruptcy are quite recognizable by American standards. These include keeping fictitious books, destroying books or failing to keep books in the first place; misappropriating or concealing assets; creating fictitious liabilities; conducting business operations for personal benefit; continuing loss-making activities for personal benefit; and using the assets or credits of a business for personal benefit or for the benefit of another entity.<sup>117</sup> Each of these provisions applies to conduct that a business manager should know in advance to be improper, and the risk of personal culpability is appropriate.

An early draft of the Romanian Bankruptcy Code disqualified an individual merchant from engaging in business for five years after the completion of a bankruptcy case.<sup>118</sup> This provision was deleted from the final version of the law, and no civil disabilities now result from filing bankruptcy.<sup>119</sup>

It appears that the filing of a bankruptcy case by a business will not likely lead to personal bankruptcy on the part of its managers or owners, under Romanian law. The law does not have a general provision authorizing personal bankruptcy cases. To qualify for filing a bankruptcy case, an individual must be a merchant, and business managers probably do not qualify under Romanian law.<sup>120</sup>

### VIII. CONCLUSIONS

The outcome of a bankruptcy case for Heavy Duty in Romania should be very recognizable to a United States lawyer. While the details of the Romanian bankruptcy law are different from those of the United States law, the general structure and features are quite similar. However, the Romanian bankruptcy statute is very new, and the judges, the lawyers, and

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117. *Id.* art. 123(1)(a)-(e).

118. Draft Romanian Law on the Reorganization of Enterprises and Bankruptcy Management, arts. 228-29.

119. *Cf.* Law No. 64 (not mentioning civil disabilities).

120. *Id.* art. 1. There is rather little need for personal bankruptcy protection at the present time, because there is little personal credit available in the Romanian economy. Residential real estate is purchased, for the most part, with cash. Bank credit for this or for other purposes is only beginning to appear. Credit cards are also beginning to appear, and in the future it appears that consumer bankruptcy relief will need to be available.

the other important players in the bankruptcy process are inexperienced in applying it. In consequence, the outcome in particular bankruptcy cases may be somewhat unpredictable until the players gain sufficient experience to know how to make the system function properly. In addition, we should not be surprised if similar bankruptcy law provisions are interpreted by the Romanian courts differently from the way that they are in the United States or in other Western countries.



