

Romanian Corporate issues around Covid-19

Until the outbreak of the COVID-19 virus many companies thought they were sufficiently well organized to deal with slight disruptions to their business either directly or through the disruption of the supply chain. COVID-19 has highlighted that there will be companies who are not as strong as thought. In these cases it is not only the company that will be affected but also its directors, owners, lenders, suppliers, customers and other contractual counterparties which will be grappling with the resulting difficulties.

As a first step companies should consider whether or not to meet immediately with their financiers and creditors with a view to negotiating short term breathing space and ensuring the business is able to continue trading. Legal assistance maybe required at this time to assist in contract variation negotiations and waivers. Even at this stage companies might consider a scheme of arrangement in relation to their business if a viable business case can be made.

Romanian companies may resort to one of the insolvency prevention procedures stipulated by Law no. 85/2014 regarding insolvency prevention and insolvency proceedings. This may seem a drastic solution so early in the process and certainly if it is possible to negotiate a settlement outside such procedure this can only be for the companies benefit.

The options and the conditions to any support will depend on the severity of the company's difficulties, and the terms of any loan agreements and trading arrangements, as well as the relationship with the creditors who themselves may have similar difficulties. Although not many companies have business interruption insurance the availability of this needs to be considered if it is in place. Insurance companies themselves will be looking at these policies and the effect on their business.

As important as the effect on the company is the effect that the problems will have on the lenders and creditors as mentioned. They need to understand their obligations as well as their rights and liabilities.

In the light of the current position and the total uncertainty of the current situation -will it continue for weeks – months or longer lenders and suppliers are going to wish to minimise their potential losses at the same time having to consider future business.

Lenders will focus on the short-term arrangements which balance the needs of their clients and at the same time protecting their own position and business. A detailed plan I am sure will be required so far as that is possible in the current situation.

Banks will have to pay attention to the extent to which provisions of the Romanian Civil Code regarding unpredictability, force majeure and/ or impossibility of execution, even temporary, are applicable to contracts concluded with companies whose activity has been affected by the COVID-19.

Suppliers to any business will be looking to see how they can limit their exposure and at the same time assisting in developing and retaining a valued customer. It should be borne in mind that what is happening is affecting every business both large and small all over the world. No business is isolated from what is currently happening. Whilst companies will look at how to reduce their financial exposure to the affected business, they may very well wish to continue to trade with the company in a manner which does not increase their financial exposure.

In most cases this will depend solely upon the terms of the contract they have negotiated but that may not be the whole picture. For example, in certain jurisdictions counterparties can be compelled to continue supplying a company which enters a formal insolvency process and will be unable to rely on the insolvency as a basis for terminating the relationship. It is important to review contracts in the light of article 77 of Law 85/2014 which identifies where service providers are prohibited from changing, refusing or temporarily interrupting delivery of service to the company (the captive consumer) undergoing insolvency proceedings.

As well as the liabilities of the companies the administrators need to be aware of their liabilities brought about by their fiduciary duties as administrators of Romanian companies. This is important if there is a real risk of a company's insolvency if cash cannot be conserved or liabilities are increased.

The rule is that administrators will exercise reasonable care, skill and diligence, and act in the best interest of the company. These duties are typically owed to the company (shareholders) but when a company is under financial stress there may be times when the administrators will need to place the position of the creditors before those of the shareholders.

In light of the potential risks the shareholders of the companies also need to take on board the fact that the administrators may decide to pursue a course of action which will limit their potential liability.

Administrators also need to consider the Presidential Decree and the decisions that flow from it. The question of meetings should be considered, and the statutes of the company may need to be amended to allow meetings by video and voting electronically as well as not requiring personal attendance.

Should companies not be able to arrive at short term solutions even at this stage the administrators should consider starting insolvency procedures with all that involves. Perhaps the virus has only accelerated a position in which weaknesses of the company are revealed and it is better for it to be liquidated for the benefit of all.

Lastly, if financial difficulties become particularly acute, directors need to be aware of any legal obligation on them to commence insolvency proceedings.

All these questions need to be answered in a manner which will result in the best solution for all. On a positive note I am sure many companies will survive and we look forward to acting as their Romanian lawyers during what is a trying time for everyone.