TUCA ZBARCEA
ASOCIAȚII

Issue 2, March 2009

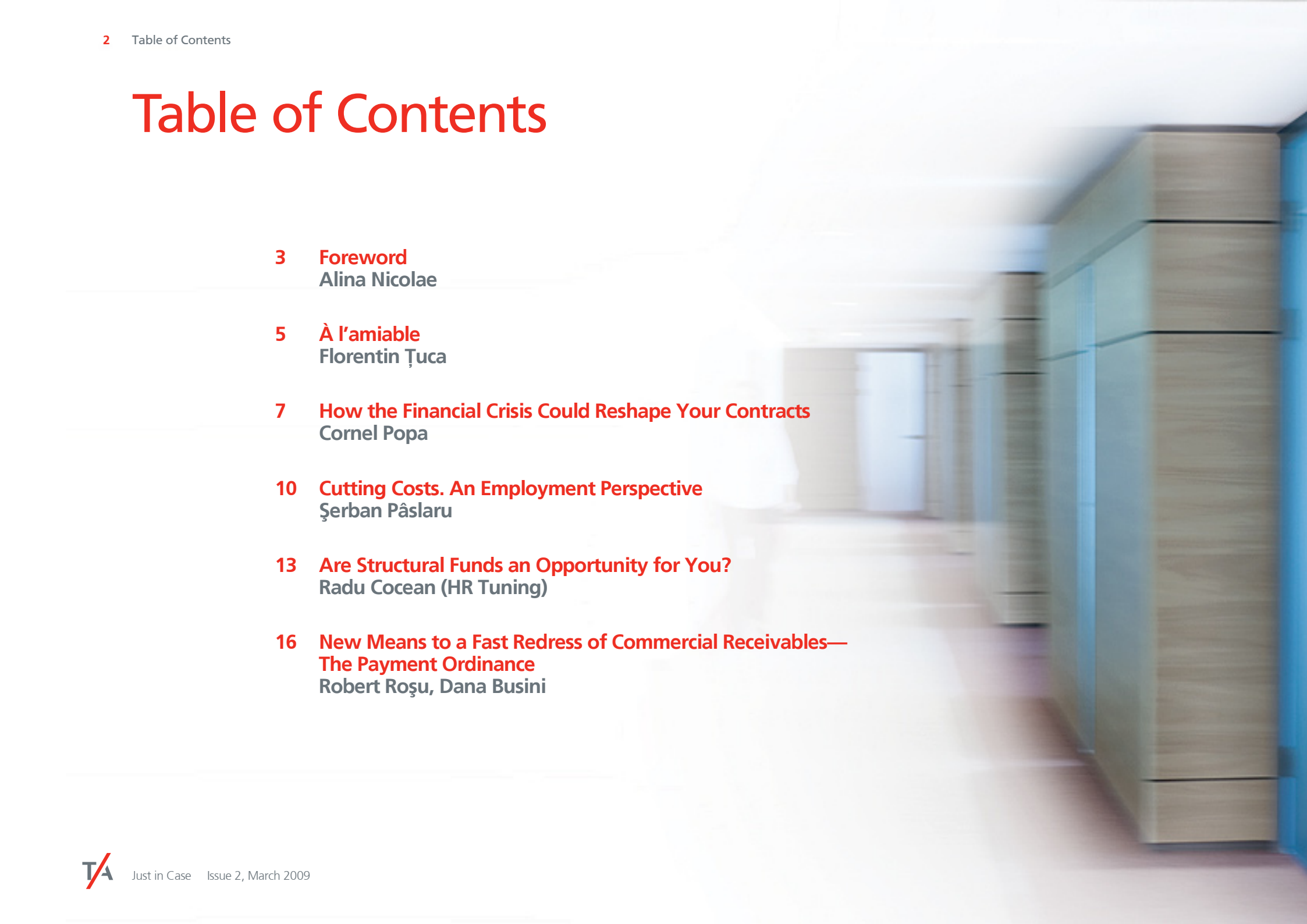
Just in Case

An online publication of Țuca Zbârcea şi Asociații

In this issue

- How the financial crisis could reshape your contracts
- Are structural funds an opportunity for you?

Table of Contents



Foreword

Here we are facing the challenges brought on by these times of uncertainty and transformation. For some, crisis is an open door to new opportunities while on others, the financial and economic downturn will have a dramatic impact.

Trying to project future is like walking down a dead-end road. Trying to project future cash flow and earnings is even tougher. From the dozen of anxious stories that have evolved in the media over the past few months, it became apparent that the economic crisis is eventually going to touch every single one of us in some way or another.

> “ Just in Case is about change. It focuses on the “how to`s” of cutting costs, reshaping the commercial contracts, fast redressing of commercial receivables. It also looks at the options on hand to find fresh sources of cheap financing.

What are our strengths and weaknesses? What opportunities and threats are we facing? Do we have the correct mind set? Do we have the resources to weather the crisis? We all know that, for businesses, the timely and efficient management of the dysfunctions generated by the crisis can make the difference between survival and bankruptcy. Well, our lawyers are here to help. In response to the unprecedented and changing market conditions, we adapted ourselves to change as we knew businesses ought to receive advice not only on how to proceed through the crisis, but how to anticipate problems and protect themselves.

Now in its second issue, Just in Case is about change.[1] It focuses on the “how to`s” of cutting costs, reshaping the commercial contracts, fast redressing of commercial receivables. It also looks at the options on hand to find fresh sources of cheap financing. A self-assessment check list will help you determine the readiness in accessing structural funds. We welcome the input provided in this respect by a new contributor to the Just in Case magazine: HR Tuning is a major organizational tuning solutions provider in the North West Region of Romania and offers management consultancy, structural funds consultancy, training and coaching. →

1. Due to space limitations and content considerations the second part of *Was That Person Entitled to Sign?* will be published in the next issue of Just in Case magazine.

Most of our articles are signed by our Crisis Knowledge Team (CKT), a newly created financial response practice group, who brings together resources from our corporate and commercial, labour, litigation and competition departments.

The group provides interdisciplinary advice to clients working through the thicket of problems associated with the current global economic events such as: the acquisition and trading of distressed assets; debt recovery and claims; corporate and investment restructurings and recapitalizations; workforce restructuring, cutting employment related costs, redundancy plans; pre- and post- workout and bankruptcy matters; complex litigation; regulatory compliance and enforcement.

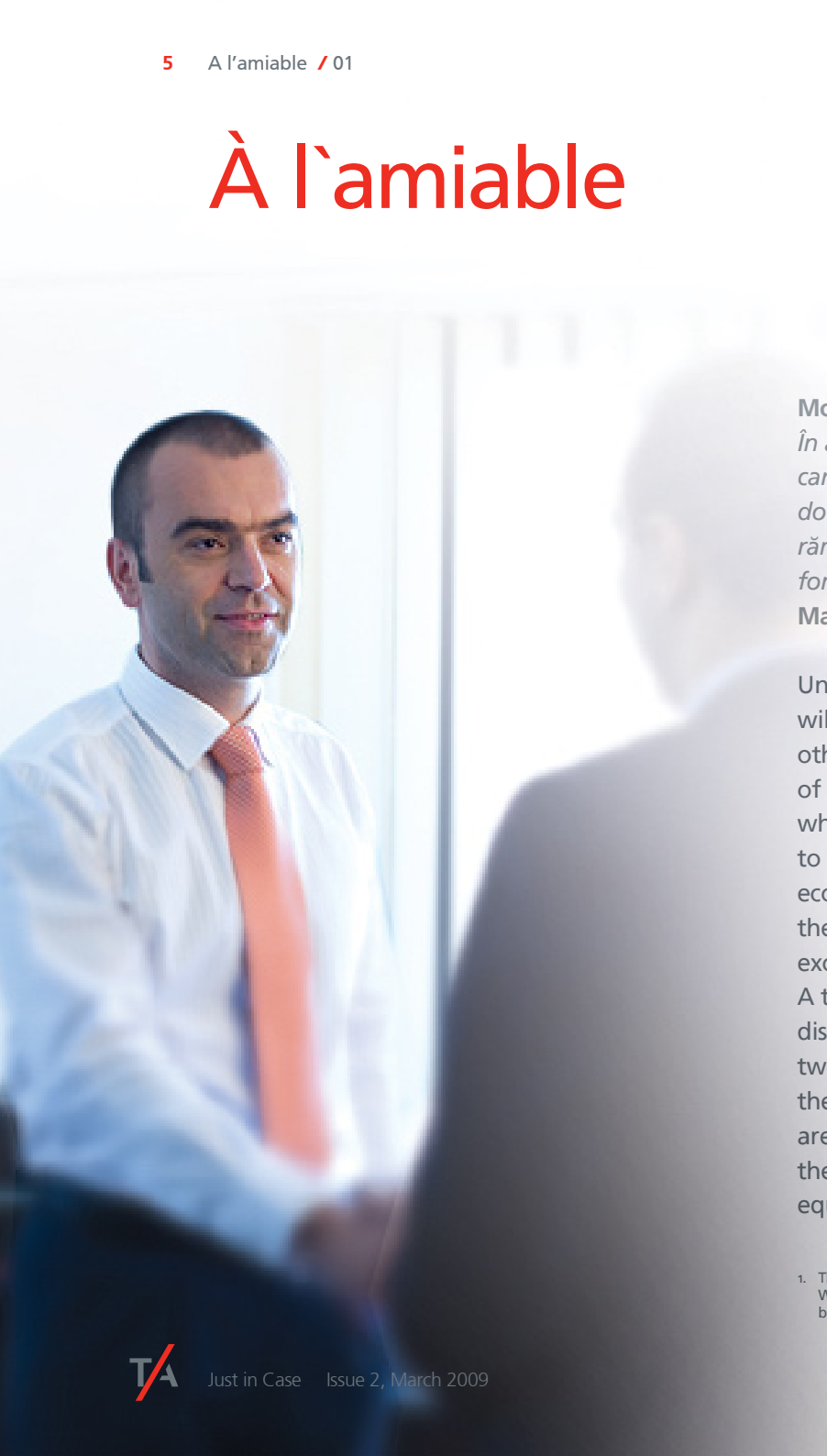
Our CKT is being coordinated by Cornel Popa, Partner and Co-ordinator of the firm's Corporate practice group, and also includes Ioana Hrisafi, Partner and Co-ordinator of the firm's Domestic Arbitration practice group, and an insolvency practitioner; Levana Zigmund, Partner and Co-ordinator of the firm's International Arbitration practice group; Raluca Vasilache, Partner and Co-ordinator of the firm's Competition and Antitrust practice group; Oana Ureche, Partner and Co-coordinator of the firm's Real Estate practice group; Şerban Pâslaru, Partner and Co-ordinator of the firm's Employment practice group.

Furthermore, in order to keep you abreast of the rapidly occurring developments, our CKT maintain an online platform that addresses a wide variety of issues in the fields of real estate, competition, employment, corporate / M&A, litigation.

Please do feel free to visit our blog www.ckc.tuca.ro on a regular basis. We welcome your comments and thoughts!

Alina Nicolae,
PR & Marketing Manager

À l`amiable



Motto

În aceeaşi zi Moromete îşi făcu socoteala datoriilor şi spre seară bătu la poarta lui Tudor Balosu cu care se întelese să-i vândă o parte din pământul familiei. […] Cu banii luați, Moromete îşi cumpără doi cai, plăti fonciirea, rata anuală la bancă, datoria lui Aristide, şi taxele de internat ale lui Niculae, rămânând ca necunoscută soluția acestor probleme pentru viitor: din nou rata la bancă, din nou fonciirea, din nou Niculae ...

Marin Preda, *Morometii* [1]

Undoubtedly, lawyers (but not only lawyers) will soon focus their debate on, among others, the hardship theory – or the theory of "imprévision". This is the theory based on which contractual clauses may be revised due to a drastic and unpredictable change in the economic circumstances which intervenes after the conclusion of the agreement making it excessively burdensome for one of the parties. A theory which is and will remain the apple of discord among scholars as it aims to reconcile two fundamental legal principles as old as the Civil Code: the principle that agreements are mandatory to the parties (agreements are the law of the parties) and the principle of equity (the parties are bound to observe not only what is expressly said in their agreement, but also the imperatives of equity and good faith). A theory fished out from the depths of law libraries and brought to surface by

> "Since equity is a fundamental principle of law, one cannot ignore it, so let's then put it to work in interpreting agreements and enforcing them in good faith.

the earthquake shaking the economy today. Carried by the crisis waves, it is still drifting among half-built residences, mortgaged estates, unpaid cars, companies paralyzed by debts and other similar icebergs. →

1. The same day, Moromete added up what he owed and, towards the evening, paid a visit to Tudor Balosu, to whom he agreed to sell some of the family plot. […] With the money from that, Moromete bought two horses, paid the land tax, paid that year's due to the bank, paid his debt to Aristide and Niculae's boarding-school but how would he solve these problems in the future was left unknown: yet again the bank, yet again the land tax, yet again Niculae. (Free translation)

People who, before tsunami stroke, bound themselves to paying millions for an estate which isn't worth a threepenny today since no one wants to buy it, will salvage this theory from the rough waters and try to use it as tug to free themselves from the grip of inpatient and worried creditors. It is not fair and it is not equitable, they will argue, to be forced to perform obligations which, under the new circumstances, have become so onerous. Since equity is a fundamental principle of law, one cannot ignore it, so let's then put it to work in interpreting agreements and enforcing them in good faith.

Creditors however will wrestle to the ground any argument that may come against what the letter of the agreement says: in front of written undertakings, equity principles, they will protest in anger, are nothing more than lawyers' big talk and sophisms. An agreement negotiated and signed in all awareness is presumed equitable and is mandatory. In addition, they may say, after the 2000-2007 tropical heat, a cooling down of the economy sooner or later was foreseeable so the arguments from the unpredictability of the crisis are not beyond dispute after all.

This debate will land on the judges' tables, too. Until then, though, it shall be the preamble of amiable renegotiations of pre-crisis agreements. This is a time not for agreements, but for addenda to agreements. This is because, on the one hand, a wrong peace may often be better than a just war.

Not to mention that, in Romania, judicial war may last forever. On the other hand, in the canvass of legal ties weaved before the crisis, a creditor who owed an obligation which became overnight too burdensome may himself be the debtor of an equally burdensome obligation: the classic case of the real estate developer owed the price of the house he sold before the crisis and owing, in turn, money to the financing bank.

The most sensitive issue in renegotiating these relations is where is one to draw the boundaries of the new status quo. Even if the theory of imprévision would be admitted in principle, and the current crisis be deemed an unforeseeable event calling for a rebalancing in the contractual relations, the question remains: how is one supposed to rethink these relations? What is, under the circumstances, the fair price one should write down in the addendum?

The parties themselves are called upon to answer such questions. The sooner they do it, the better, as the future is riddled by gloomy warnings of a huge crisis and new problems are waiting for a yet unknown solution: yet again the bank, yet again the land tax, yet again Niculae…

Florentin Țuca,
Managing Partner

“ This is a time not for agreements, but for addenda to agreements. This is because, on the one hand, a wrong peace may often be better than a just war.

How the Financial Crisis Could Reshape Your Contracts

Something happened in a sunny afternoon of May, 1920, in Bucharest. To unsuspecting passersby, it looked like an ordinary day at the Ilfov Tribunal in Bucharest.

Claimants, defendants or witnesses packed the courtrooms as usual, in search of justice for actual or imaginary wrongdoings, lawyers emphatically pleaded their cases, and judges listened as in any other place in the world, affecting knowledge of the files piled before bored-to-tears court clerks. However, in a small office, far from the eyes of the boisterous crowd, a couple of judges were debating the settlement of a case which at first sight looked rather typical for the aftermath of World War I. Eight years before, one Romanian bank, owned by a powerful Jewish family of the day, had extended a loan to a rich entrepreneur, who incidentally bore the name of the former Romanian prime minister, Lascăr Catargiu (which is known today, unrightfully by many, not by his reputation as a politician, but as the guy giving the name of one of the nicest downtown boulevards in the Romanian capital). The currency of the contract was the Belgian Franc, which in 1912 had the same value as the Romanian Leu. Based on the agreement, the bank nevertheless effectively disbursed the loan in lei. In 1919 however, the bank sought reimbursement from Mr. Catargiu in Belgian Francs, whose value meanwhile became seven time higher than that of a severely weakened Romanian Leu. Mr. Catargiu resisted that demand and asked the court to revise the contract he had entered with the bank. Eventually, the tribunal allowed the claim, and ordered, albeit contrary to the express provisions of the agreement, that the repayment be made in Romanian Lei. The judges essentially relied on the existence unforeseen exceptional circumstances (such as the war), which destroyed the economical equilibrium foreseen by the parties at the time of making their contract.

> “ It does not take a bloody war though for the Romanian courts to feel entitled to intervene in contracts and adjust their terms.

It does not take a bloody war though for the Romanian courts to feel entitled to intervene in contracts and adjust their terms. In the last decade of the past millennium, the country was experiencing the most painful moments of its transition to a market economy. Job loss, lack of financing and spiraling inflation made the headlines. Against this background, →

the courts accepted that something needed to be done about some long or medium-term contracts which provided for fixed financial conditions, where prices had been expressed only in a battered Romanian Leu, which subsequently faced severe devaluation. Even though reluctant in the beginning, judges ended up in consistently allowing (in particular in lease-related claims) creditors' claims for the revaluation of the prices according to fair market value of the services or the goods provided.

Although separated by almost a century, this jurisprudence may be particularly relevant in the context fomented by the world financial crisis. As the economy slows down and the mood among entrepreneurs worsens every day (unfortunately for good reason), the traditional theory of the sanctity of contracts– which is also an essential part of the body of principles of the Romanian civil law system– shall be stressed to its limits, and the question is if it can endure in the extreme form that it is still advocated by many Romanian lawyers and scholars, and which excludes any adaptation or termination of a contract due to changing circumstances.

Hard times, hardship

The legally parlance to describe the possibility to adjust a contract to a changing environment is the Latin expression *rebus sic stantibus*, which in three words attempts to convey the meaning that a contract should be maintained in its original form and substance while the circumstances prevailing at its conclusion still stand.

Alternative terms being used are "hardship" (generally translated in Romanian as "impreviziune") or "hardship clause"–which is a device used in many international trade contracts by sophisticated parties in an attempt to regulate the impact on their contract of new adverse circumstances, rendering the performance of the contractual obligations excessively burdensome for one of the parties.

> "Had it known in advance the new circumstances, a good faith person would have contracted in the same terms and conditions?

Even if hardship has effects which are somehow similar to those of the more popular force majeure events, it remains a different notion: one essential difference is that in cases of force majeure, the performance of contractual obligations becomes objectively impossible, while in situations of hardship, the debtor remains able to perform its duties, albeit at a much greater cost than originally expected. It is therefore more likely that the effects of the financial crisis will be closer to those of hardship than to force majeure.

So, how could one renegotiate an agreement strained by the financial crisis?

Let us take the example of a tenant of leased office space. It has been hit in the recent months by the devaluation of the Romanian Leu against the euro, by lowering demand for its services and products, and it resentfully looks at the dust left behind competitors able to secure better financial terms for new leases in the currently declining real estate market. It has been cutting costs from all over the place, but something still needs to be done in order to keep afloat. The conclusion is that it also needs to look at its lease agreement and attempt to obtain a better rent.

Apart from various business-related arguments, from a legal perspective, there are several things to be kept in mind. First, before making a hardship claim, the concerned person should make sure that it is not in default of its own contractual obligations. Second, the hardship event should have occurred after the conclusion of the relevant agreement. Third, the event should have not been predictable at the time of the conclusion of the agreement. Fourth, our tenant will have to be able to prove that the continued performance of the agreement would be excessively burdensome, and the original economical balance between the parties is severely affected. Essentially, all these things boil down to a seemingly simple question: had it known in advance the new circumstances, a good faith person would have contracted in the same terms and conditions? →

Some simple smart things to do

OK, so let us assume that a party feels that it worth the effort to seek the revision or even the termination of an agreement for cause of hardship. Practically, what that party should be doing?

- First, take a good look at the contract. Is there any clause in there allowing for the adjustment of the contract or certain of its terms, in case of changing circumstances?
- Is there a termination clause which may be used as means to induce a reluctant contractual partner to be more open to renegotiation?
- Has the contractual partner observed its obligations?
- Is there something in the special applicable legislation allowing for contract adjustment?
- Make an evaluation of the financial benefits of each party at the time of the conclusion of the contract, compare them with the current situation and to any available forecasts for the future; if there is a serious imbalance between the current position of the parties and the original one, there might be a case for hardship…
- If a contract has not been concluded and is still under negotiations, then an adjustment clause should be considered. The better practice is to avoid making simply a general reference to the "change of circumstances" or to the "excessive burden" caused to a party. Vagueness will only open the door for endless discussions about what constitutes or not good cause for the adjustment of the contract. So, to the best possible extent, clarity about the conditions under which a party may call hardship and the contractual effects of hardship, is a must (unless someone would like to confuse things, which regrettably is sometimes the case…);
- On the contrary, if one would wish to make sure that no hardship event has influence over the agreement, this should be stated as such.

A bit of clarity on the road ahead. But not too much…

The draft Civil Code of Romania has a special provision dealing with the effects of hardship, which is defined as a change of circumstances occurred after the conclusion of the agreement, that could not be envisaged at the time when the agreement was made, for which the concerned party could not be held responsible, and which renders the performance of contractual obligations excessively burdensome. Should these conditions be fulfilled, then the interested party shall be entitled to renegotiate, failing which the court may order the appropriate remedy or even terminate the agreement.

While these new provisions make a small leap forward as they may end the debate on the general admissibility of contract adjustment in hardship situations, the dispute will continue to rage on the criteria to determine what "excessively onerous" means, or in what manner the courts will exercise the discretion to amend or terminate the agreement. As usual, the likely winners are the more sophisticated parties, able to secure better contractual terms and to word the contractual clauses in the manner best suitable to their interests…

" Should these conditions be fulfilled, then the interested party shall be entitled to renegotiate.

Cornel Popa,
Partner and Co-ordinator of the Crisis Knowledge Team

Cutting Costs. An Employment Perspective

Judged by appearances, until mid of 2008 Romania seemed to promise the investors entering its markets a long lasting economic growth accompanied by social stability, cheap labour, and a wide variety of business opportunities.

Now Romania is facing the first global financial crisis since it became market economy and joined the European Union. States from Western Europe had to deal with recession as recent as the late 1980s and early 1990s, while Romania was plunging into transition after living its last years as state planned economy. Romanian politicians and authorities do not seem to be ready for facing the challenges of the new financial and economic context. And, while the economic indicators start falling down one after another, the perspective of entering into recession after 8 years of continuing growth worries the economic environment. Facing the lack of efficient reaction from the authorities, what the investors will do?

Crisis always hit employment, making room for unemployment. Trying to avoid redundancies, companies are seeking solutions for cutting employment costs, especially in those industry branches where they represent a significant portion of the total operational and production costs. Cutting costs policies are usually aimed to keep companies' profits at a satisfactory level but in the current context the same policies may become necessary for ensuring the companies' survival.

Legal constrains

Any cost reduction scheme has to observe the legal constrains deriving from the Romanian legislation. And, as far as the labour legislation is concerned, such constrains are high, given →

that Romania is "benefiting" from an excessive employee protective framework.

This article is intended to address the legal implications of some of the alternatives usually chosen by the companies in view of optimising their labour costs, as well as the practical impediments which the companies may face in implementing them.

Freezing salaries is in principle possible

Pursuant to the Labour Code, salary may be defined as representing the consideration received by the employee for the work he/she performs based upon an individual employment agreement.

> "Salary is one of the essential elements of the employment relationships entered into between the employee and the company.

At the same time, salary is one of the essential elements of the employment relationships entered into between the employee and the company, which are regulated by the individual employment agreement. Consequently, changing the salary amount shall imply the amendment of the employment agreement which can be done only if the consent of the employee is obtained. Freezing salaries but not decreasing would be therefore, in principle, possible.

Salary related provisions sometimes include mechanisms whereby the salary value is subject to annual increases so as to cover inflation or currency depreciation or to reflect salary increasing scales agreed between companies and employees. Such increases are not performance based and they shall therefore activate irrespective of the performance or the results which companies or particular employees have.

It is difficult to assume that the employees and, in case the increase mechanisms are set forth under collective bargaining agreements, the trade unions, will accept cutting such benefits. In such circumstances, freezing salaries remain an imperative that can not be practically achieved, even if the economic results can no longer sustain the costs.

Cutting bonuses may prove to be difficult

Bonuses are typical instruments aimed to encouraging performance and motivating staff. They are supposed to be linked to professional achievements and to ensure an accurate reflection thereof.

Nevertheless, such motivational instruments are accompanied by other types of bonuses, of which some are mandatory under the law, whereby salary increases are ensured based upon loyalty, length in service, personal status etc. In other words, there are bonuses which are not related to performance and which, in a crises context, are not affected by lack of economic results at company level. As long as they are stated under employment agreements, cutting such bonuses will also require an agreement with the employees, which, in practice, may prove to be difficult to reach. Moreover, some types of bonuses are regulated under collective bargaining agreements concluded at national and branch industry level so cutting thereof could be even more difficult.

Other benefits are also among the targets

Not only bonuses but also other types of benefits, including allowances, facilities, incentives, subscriptions etc, are among the targets of cost cutting schemes. Including such targets in the cost cutting schemes is very much depending on the way the respective benefits have been granted to the employees.

> "In such cases, the employers may opt for a unilaterally cut, which may trigger important savings.

Most of the companies usually choose to limit the benefits of their employees to the level and categories which are mandatory under the law and the collective bargaining agreements applicable at national or branch industry level. Such benefits could not be cut except if the law or the relevant collective bargaining agreements are amended in this respect.

There are however other benefits, including in kind (car, laptop, mobile phone etc), which are given to the employees as part of the →

company's policies, without being necessarily provided in the employment agreements. In such cases, the employers may opt for a unilaterally cut, which may trigger important savings.

Restricting overtime– a management issue

Restricting overtime is often seen as a measure of cutting employment costs. Sometimes, it can be achieved by mere implementation of a better control over the entire work schedule, without affecting the total number of hours worked by the employees. Practically, the more overtime is transformed into regular work time, the less has to be cut from the total work hours. Such a scheme could have a direct impact on costs, given that overtime is usually paid at least double.

Being strictly a business organization matter, the overtime management shall not require, in principle, the involvement of the trade unions.

Cutting working hours is difficult to achieve

Unlike restricting overtime, cutting working hours may prove to be difficult to achieve.

The employment agreements include express provisions regarding the number of hours the employee has to spend under a regular work schedule. The salary negotiated with the company is going to be paid in both cases when the employee work the complete number of hours specified in the employment agreement, as well as when such hours are not entirely covered for reasons which are not due to his/her fault.

In other words, cutting working hours can not be implemented to the extent that it triggers salary decreases.

"Technical unemployment"– a temporary solution

Pursuant to the Labour Code, the companies facing economic difficulties may decide to suspend the employment agreements of some or all of their employees and to send them home under the so called "technical unemployment".

> "Any cost cutting methods may prove to be efficient, from case to case, depending upon the particularities and necessities of each company.

During the "technical unemployment", the employees shall receive however 75% of their salaries. Therefore, the extent to which such instrument is used has to be analysed from case to case. It could be cost cutting if determined by temporary suspension of activity but it may also become a cost burden if the employees remain home for longer periods.

Other ways…

There are also other means whereby employers seek for cost cutting solutions, including freezing new hiring, staff relocation, professional re-conversion etc.
Such measures do not imply redundancies. Other approaches aim to reduce the number of personnel, ensuring, at the same time, that dismissals are avoided. Thus, using the so called "voluntary termination plans", companies offer their employees the possibility to voluntarily apply for the termination of their employment, in exchange of severances. No employee can be forced to accept such plans. Therefore, as a matter of practice, the companies have to ensure that the severance packages are attractive.

Any cost cutting methods may prove to be efficient, from case to case, depending upon the particularities and necessities of each company. The rapid contraction of the markets may determine the implementation of more drastic measures in terms of cost cutting, which may even include collective dismissals.

Şerban Pâslaru,
Partner and Co-ordinator of the Employment Practice Group
Member of the Crisis Knowledge Team

Are Structural Funds an Opportunity for You?

In a stalled economy, where new clients are becoming scarce and hard to find, where credit crunches and cash flows dry up, it is imperative for all companies to find fresh sources of cheap financing.

One of the solutions can be accessing Structural Funds. That is why, in this time of crisis, we, as a project management consultancy company, are bombarded with information requests from various prospects on different grant schemes, their calendar and guidelines for implementation.

> “ A company should explore available grant schemes only if it considers investments in goods, services or construction works.

After numerous meetings with such potential customers, it became apparent to us that not all of these companies have a clear understanding of what a financing project really is. Not all of them fully appreciate the kind of commitment such a project involves. And not all of them understand the pre-requisites that should be in place before a company is ready to seize up the opportunities presented by these funds.

This article, therefore, prescribes a sort of checklist to assess one’s own “Structural Funds readiness”. To keep it short and tidy, we opted for a limited set of relevant criteria, and let the reader explore application guidelines for a more detailed perspective on the matter.

Do you need to buy something?

Financial assistance from Structural Funds is mainly meant to help beneficiaries make acquisitions. Therefore, a company should explore available grant schemes only if it considers investments in goods, services or construction works.

Many firms look at the list of eligible expenditures and say: “hey, they finance the acquisition of these A products. Well, I’m an A product producer myself. Can I access these Structural Funds, so that I may boost my sales”? The answer is, usually, no – and the only hope in this case is that other companies, interested in buying A products, will access funding and will then invite potential suppliers to participate in the tender process.

Do you have an investment budget already in place?

Structural Funds are meant to help your company invest in a strategic manner. They have a maximum impact if they address true priorities, that have a clear impact on the company’s bottom-line.

Sometimes, potential applicants require information on available funding and then try to think if there is anything they may need from the list of eligible expenditures. On the spot, they come up with eligible project ideas, without truly asking themselves: how important is this investment for the future of my business?

Do you have enough money to finance the project?

Structural Funds reimburse a certain percentage of eligible expenditures. What this means is that the beneficiary must invest its own money and complete various stages of the project before being able to get back a part of its investment. And although grant schemes differ when it comes to the possibility of getting any financing in advance, the number of partial payments and the specific conditions for making a partial payment claim, companies should be ready to support most of the investment from their own budget before receiving any euro from the Structural Funds.

> “ Most calls for projects have an interval of at least two months for companies to write projects before the final submission dead-line.

What this means is that potential applicants should have sound cash flows allowing them to make the projected investments in due course and wait to be reimbursed without this having a detrimental effect on their day-to-day operations.

Do you have time to wait for the financing process to unfold?

Structural Funds are not meant for satisfying immediate business needs. With the exception of ongoing grant schemes (kept open until the funds are exhausted), most calls for projects have an interval of at least two months for companies to write projects before the final submission dead-line. These projects are evaluated and then contracting procedures should be followed through. Since no expenditure is eligible before signing →

the financing agreement, a company should wait for at least four months before the project idea turns into project implementation.

A lot of things can happen on the market in four months (just consider the euro exchange rate fluctuations); therefore, the choice of timing and the type of investment considered should be carefully examined before deciding to write a project.

Is your business ready to be X-rayed by public authorities?

Structural Funds have very strict and transparent accounting procedures. Any company thinking about writing projects should have the necessary expertise to implement projects according to these rules (for example, public procurement rules should be followed to the letter – a thing most private companies are not used to do) and be ready to submit to audits on the way they spent the money throughout the project.

Are you a determined and resilient person?

A project will require you to get acquainted to a new terminology and procedures. During its lifespan (anywhere from one month to two years), it will demand constant attention, filling in paperwork and always double-checking to make sure all your reports are accurate and in accordance to regulations. Tension is always there, knowing that if the project fails to achieve its objectives and results, funding may be lost.

Of course, many of these hardships can be surpassed by contracting consultancy services from a professional company. Still, your self-assessment checklist should yield at least 4 YES to even begin surfing through various operational programs, grant schemes and ministries' websites.

Radu Cocean,
Managing Partner
HR Tuning

HRTUNING
upgradingpeople

T: +40 (364) 88 44 60
F: +40 (364) 88 44 61
M: +40 (771) 60 17 01
radu.cocean@hrtuning.ro
www.hrtuning.ro

New Means to a Fast Redress of Commercial Receivables—The Payment Ordinance

In these times of economic and financial distress one of the first steps that any diligent businessman should take is inventorying the company's receivables with special focus on those with actual chances of being recovered.

Once they have been identified, the attempts to recovery them should be immediately started. While negotiation remains the most elegant way to approach business partners or clients owing money to you, it may sometimes lead to significant delays in recovering the debts or appear not to be a reliable means in consideration of the actual circumstances.

The amounts owed under commercial agreements, whose existence is certain, whose value is determined and having the payment term overdue are now more easily to be recovered through an emergency legal proceedings: the payment ordinance (Romanian: "ordonanța de plată").

The Government Emergency Ordinance no. 119/2007 ("GEO 119/2007") regulating this fast recovery procedure implemented the provisions of Directive 2000/35/EC of the European Parliament and of the Council on combating late payment in commercial transactions.[1]

The issuance of GEO 119/2007 raises a practical issue with respect to its correlation to Government Ordinance No. 5/2001 on the payment notification proceedings (Romanian: "somația de plată")—another emergency proceedings. Therefore, to the extent that the provisions of the two enactments overlap, we shall emphasize the advantages that, under certain circumstances, the payment ordinance proceedings may offer to creditors. →

1. Directive No. 2000/35/EC of the European Parliament and of the Council of June 29, 2000 on combating late payment in commercial transactions aims to prohibit "the abuse of freedom of contract to the disadvantage of the creditor" as it was noticed that "Late payment constitutes a breach of contract which has been made financially attractive to debtors in most Member States by low interest rates on late payments and/or slow procedures for redress". The recitals of the Directive reveal that the aim to combat late payment may not be achieved by the Member States through their individual action, and concerted action needs to be taken in the European Union.

When can the creditor apply for the payment ordinance?

These proceedings may only be applied for the recovery of receivables meeting the following criteria:

- They are certain, liquid and outstanding;
- They represent payment obligations arising out of commercial agreements.[2]

The receivable is deemed *certain* when its existence is beyond any doubt irrespective if its existence arises from the receivable deed itself or from other deeds, even if not authenticated, when issued or acknowledged by the debtor.

> “ The procedure may be employed for the recovery of debts against public authorities, arising from a public procurement agreement or concession of public works or services.

The receivable is considered *liquid* when its amount is determined by the receivable deed itself or when it may be determined with the aid of the receivable deed or other unauthenticated deeds, either issued or acknowledged by the debtor, or opposable to him based on certain legal provisions or dispositions included in the receivables deed.

The receivable is *outstanding* if the payment term provided in favor of the debtor expired, regardless whether the payment term is provided in the agreement or established by virtue of law.

The scope of this special debt recovery procedure includes receivables from commercial agreements between traders, as well as from agreements concluded between traders and contracting authorities, having as object the supply of goods or services in consideration of a price consisting of a certain amount of money.[3] Consequently, the procedure may also be employed for the recovery of debts against public authorities, arising from a public procurement agreement or concession of public works or services.

The payment ordinance procedure is not applicable if the payment obligation refers to amounts representing, for example, the payment of certain social security rights, or of amounts of money arising from a civil agreement, or unjustified enrichment, etc.

GEO 119/2007 does not cover, however, two categories of commercial receivables when it comes to applying these urgency proceedings: the receivables registered on the list of creditors within insolvency proceedings and the receivables arising from agreements concluded between traders and consumers. Therefore, the creditors whose receivables were registered in the final receivables table, as per Law No. 85/2006 on insolvency, may enjoy their rights according to such special insolvency provisions, throughout the general insolvency proceedings or the simplified proceedings, as the case may be. The consumers may make use of the common law procedure to recover their debts against the traders.

The creditor may also claim additional damages for all expenses incurred with the recovery of the amounts as a result of the late fulfillment of the obligations by the debtor.

Some procedural aspects

The application for the issuance of a payment ordinance shall be submitted with the court that has due competence to judge on the merits of the matter in the first instance, which is established according to the general rules of competence ratione materiae (the lower court for claims with a value up to RON 100,000 or the tribunal for claims with a value over RON 100,000).

If the claim refers to payment obligations arising from public procurement agreements or concession of public works or services, the competent court is the court for administrative claims that will apply the legal provisions on the payment ordinance proceedings. →

2. The payment notification procedure refers to a wider area, as the obligation can be either civil or commercial.

3. According to GEO 119/2007, “the contracting authority” represents: (i) any State organ, acting at a central, regional or local level; (ii) any public law body, lacking commercial or industrial nature, but holding a legal status, financed by a public authority or subordinated to such authorities; (iii) partnerships consisting of one or several contracting authorities mentioned above; (iv) any other legal entity, performing the concession activities provided by chapter VIII, section 1 of GEO No. 34/2006, on the basis of a special or exclusive right, granted by a competent authority, when it awards public acquisition agreements or concludes agreements for the performance of such activities.

The claim is subject to a stamp duty of RON 39. Like in the case of payment notification proceedings, the preliminary stage of direct conciliation is not required.
The parties will be summoned according to the provisions of the Civil Procedure Code regarding the urgent matters,[4] to offer explanations and clarifications, as well as in order to insist on making the payment of the amount owed by the debtor or in order for the parties to reach an agreement on the payment method.

The length of the trial on the payment ordinance application (in first instance) may not exceed 90 days from being submitted by the creditor with the court, exclusive of any delays imputable to the creditor.

Submitting a statement of defense is mandatory under GEO 119/2007, failure to do so leading to the respondent losing the right to submit further evidence in its defense and to upheld incidental objections, except for those of public order. In addition, unlike the payment notification procedure, failure to submit the statement of defense until the first hearing term entitles the judge to consider it a relative presumption of recognizing the creditor's claims.[5] Furthermore, the debtor's right to challenge the debt claimed by the creditor may be supported only by a statement of defense, failure to so do triggering the loss of such right.

The debtor is allowed to file a counterclaim subject to observing the special terms provided for the admissibility of the creditor's claim.

What evidence can be used in support of the claim?

Unlike the payment notification proceedings that allows only documentary evidence and judicial testimony, the payment ordinance proceedings allows other types of evidence as well.

The types of documents accepted as evidence include any commercial paper that proves a certain, liquid and outstanding debt: notarized or privately signed documents, invoices accepted for payment, commercial correspondence (letters, memos, telegrams, facsimile messages, e-mails, ledgers of the parties, etc).

> "The debtor's right to challenge the debt claimed by the creditor may be supported only by a statement of defense...

Other means of evidence may also be used: judicial testimony arising from statements of parties or from the statement given by a party on the occasion of the explanations or clarifications requested by the judge, recognition by the debtor of the creditor's claims or implicit recognition from lack of submitting a statement of defense. Such latter situation implies, as we have mentioned above, a presumption of recognition to be appreciated by the judge.

Although the law does not expressly exclude it, judicial expert reports (technical, accounting, etc) may not be used as they relate more to the merit of the matter being therefore inconsistent with the requirement that the receivable be certain.

In the same line, exercising the right to defense may not adversely affect the rights of the creditor and may not affect the urgency in judging such claims, considering that, as we have already shown, this special procedure may not exceed 90 days from the submission of the claim, except for those delays attributable to the creditor.

What may be the outcome of the payment ordinance proceedings?

Similarly with the payment notification proceedings, if the creditor states to having received the outstanding amount during the course of the proceedings, the court shall acknowledge such circumstance by an irrevocable order.

If the creditor and the debtor reach an agreement on the payment of the outstanding debt, the court shall acknowledge such agreement by passing an order that →

4. The promptness of the new procedure results also from the summon being handed to the party 3 days before the hearing term, as opposed to the notification procedure, that provides a 5-day term.

5. Art. 7 para (4) of the GEO 119/2007.

constitutes writ of execution.

If the court finds the creditor's claim being ungrounded or inadmissible it will overrule it by means of an irrevocable award. The creditor is not entitled to challenge this award, but it may further seek its claim through another action in court on the basis of the ordinary civil proceedings.[6]
If the creditor's application for payment ordinance is allowed, the court will issue a

> "If the creditor and the debtor reach an agreement on the payment of the outstanding debt, the court shall acknowledge such agreement ...

payment ordinance mentioning the amount and the due date. The order to pay may be issued even for only part of the amount claimed by the creditor. This may be the case, for example, when the debtor recognizes only a part of the creditor's claims. For the remaining portion of the debt, the creditor is entitled to submit a claim on the basis of the ordinary civil proceedings.

The payment term will be no less than 10 days and no more than 30 days from the communication of the payment ordinance, unless the parties expressly agree otherwise.[7]
As regards the ways to challenge the payment ordinance, it is only the debtor that may challenge the payment ordinance likewise in the case of the payment notification proceedings. The challenge means consist in a motion for annulment that may be filed within 10 days from communication of the ordinance.

The debtor may apply for a stay of the enforcement of the payment ordinance passed by the court, according to the general rules. Unlike the proceedings under GO No. 5/2001, application for the stay of the enforcement may only be grounded on issues related to the enforcement procedure, not on defense arguments pertaining to the merits of the matter.

Why Do We Recommend the Payment Ordinance Proceedings?

The advantages of the payment ordinance proceedings may be summarized as follows:

- The length of the proceedings may not exceed 90 days from the date of submitting the claim;
- The types of evidentiary means is more numerous than those envisaged by the provisions of GO No. 5/2001;
- Failure by the debtor to submit a statement of defense gives room to the relative presumption of the debt being recognized;
- It may be employed for the recovery of debts against contracting authorities resulting from public procurement, concession of public works or of public services agreements;
- If the application for issuing a payment ordinance is declined, the creditor is still allowed to file a claim under the ordinary civil proceedings.

Robert Roşu,
Partner and Co-ordinator of the Litigation Practice Group
Member of the Crisis Knowledge Team

Dana Busini,
Associate

6. Which means that judgment made in the payment ordinance proceedings may not be deemed res judicata with regard to the merits of the claim.

7. The new enactment is different than the provisions of GO No. 5/2001 in terms of the ways to communicate the payment ordinance, which is to be made immediately to each party, according to the ordinary notification procedure. Under GO No. 5/2001 the notification was to be made by registered letter with receipt confirmation.

/ **The materials included herein are prepared for the general information of our clients and other interested persons. They are not and should not be regarded as legal advice.**

Victoriei Square
4–8 Nicolae Titulescu Ave.
America House, West Wing, 8th Floor
Sector 1, 011 141, Bucharest

Ⓣ +40 (21) 204 8890
Ⓕ +40 (21) 204 8899
Ⓔ office@tuca.ro
Ⓦ www.tuca.ro