THE HARMONIZATION OF THE EUROPEAN LAWS ON INSOLVENCY

Luminița TULEAȘCĂ*

Abstract

The harmonization of the European legislations on insolvency, in reference to the problems related to the substantive law of insolvency, represents a new stage, required by the European legislative process. The outline and analysis of the current problems of European, cross-border insolvency, of its causes and effects at the European Union level and, in particular, of the solutions proposed for the elimination of such problems, represents the concern of this paper. The INSOL EUROPE Report - Academic Forum "The harmonization of the laws on the insolvency at the European Union level" represents a first and important scientific step in this matter, and, therefore, this European document represents the starting point for analysing the utility and the means of harmonizing the European laws on insolvency, as a solution to the present difficulties generated by the cross-border insolvency at the EU level, from the view of the Romanian law and based on the Romanian experts opinions.

Keywords: *cross-border insolvency, European laws harmonization, INSOL Europe Report.*

I. Introduction

1. As always, the reality represents the harshest test of the laws and, from this perspective, the laws on cross-border insolvency could not be an exception.

The outline and analysis of the current problems regarding the European, cross-border insolvency, of the causes and effects of the same at the EU level, but, in particular, of the solutions proposed for their elimination, represents the main concern of this paper.

For the right approach of this topic, very actual in the specialized literature, is important to present the current legislative context with a view to the relevant European laws, to the main problems related to the cross-border insolvency and of the main cause of it: major regulatory disparities in the insolvency matter, at the level of the EU member states.

The comparative law approach is an essential aspect of the insolvency: the admissibility conditions for opening the insolvency procedure on which there are various regulations, as above-mentioned, is a mandatory step supporting the need to harmonize the European laws in the insolvency matter.

Of similar importance is also the outline of the practical aspects, of the cross-border insolvency cases, of those involving Romanian legal entities and Romanian citizens, as well as those settled by the competent courts of our country.

---

* Lecturer, Ph.D., Faculty of Law, Romanian-American University, Attorney-at-law, Bucharest Bar Association; The article has been drafted under the Research Grant offered by the INSOL Europe Academic Forum with the generous sponsorship of Edwin Coe LLP.

And last, but not least, as the harmonization of the European insolvency laws have been proven and accepted, it is useful to present and analyze the means for achieving such an objective, from the perspective of the document that will comprise all the uniform norms in the matter of insolvency and of the legal nature of the European legal instrument on insolvency.

The paper grounds on the Romanian and foreign specialized literature for grounding its analyses, although it worth mentioning the fact that the number of the specialized studies on the harmonization of the substantive laws on insolvency at the European level is quite limited.

II. The current legislative framework – European and national regulation on cross-border insolvency

2. The extension of the trade companies' activities beyond the borders of a state has entailed, naturally, the reality of the cross-border insolvency.

The cross-border insolvency rises complex and multiple problems, the difficulties being entailed by the legislative disparities, the substantive laws and procedural laws, by the conflict of jurisdiction and state-related laws, where the debtor's insolvency must be initiated, the conditions for opening the insolvency proceedings, the law called forth for applying the insolvency, the international effects of insolvency, a.s.o.

All these difficulties corroborated with the impact of these procedures on the proper function of the internal markets have required the drafting of legislative instruments representing uniform relevant instruments.

At the European level, the first and the most important step has been taken by means of the Regulation (CE) no. 1346/May 29th 2000 regarding the insolvency proceedings, effective as of May 31st, 2002 (hereinafter referred to as the Regulation)[1], harmonizing the most important aspects of the international insolvency: conflicts of jurisdiction and conflicts of laws, attempting to harmonize the laws on companies in distress and the expedient settlement of the conflicts of laws and jurisdiction in bankruptcy matter[2].

In fact, the Regulation represents the first international conflict-solving objective instrument in the insolvency matter having direct applicability in a large number of states: all the member states of the European Union and of the European economic area, except for the Denmark.

In our country, as a result of the transposition in the internal laws of the directly applicable European laws, the cross-border insolvency is regulated by the Law no.637/2002 on the regulation of the international private law relations in the insolvency law[3].

---

[1] Regulation (CE) no.1346 of 29 May 2000 on insolvency procedures, published in the OJEC L 160/1 on 30.06.2000, p.143-160; available in Romanian at:<< http://www.just.ro/Portals/0/CooperareJudiciara/Legislatie Comunitara/1346%20insolventa.pdf>> (last visited on December 10th 2010);

[2] L.Idot, C.Saint-Alary-Houin, Procedures collectives-Droit communautaire en gestion, J.-Cl.Europe, Fsc.871 quoted in Michel Jeantin, Paul Le Cannu, Droit du Commerce International, 2e edition, Dalloz, Paris, 2000., no. 555, p.360**;** Daniela Claudia Muntean, <<*European Insolvency Regulation– Central Theme of the Conference "Current developments in the bankruptcy laws" that has taken place in Dubrovnik-Croatia, during 16-18 November 2005*>>, in R.D.C. no. 3/2006, p.174; I.Turcu, *"Creation of the European bankruptcy law (II)",* R.D.C. no. 4/2001, p.13 and following.; Bob Wessels, *"Improving the operation of the EU Insolvency regulation",* Revista Romana de Drept al Afacerilor (Romanian Business Law Magazine), Supplement, I/2007, p.22;

[3] Law no.637 on 07.12.2002 on the regulation of the international private law relations in the insolvency field, published in the Official Monitor, Part I no. 931 in 19.12.2002;

Both regulations, European and national, have represented, upon the adoption date, major starting points in providing a coherent method for opening, implementing and closing the insolvency proceedings at the European level.

The strong, essential points of the current regulations are not enough for covering all the cross-border insolvency aspects; however they will be the starting point of the action to be taken for harmonizing the European laws on insolvency.

Thus, the Regulation applies to the collective procedures based on the debtor's insolvency involving its complete or partial divestment and the appointment of a bankruptcy judge without any mention on the significance of the insolvency status[4], aspect exclusively regulated by the member states laws.

Moreover, the Regulation does not contain any provisions on the debtor's capacity, individual or legal entity, trader or non-trader subjected to the insolvency procedure but, by way of express provision, does not apply to the insurance companies, to the credit institutions and to the investment companies, to special regime legal entities regulated by special laws.

The main objective of this regulation is avoiding the debtor's temptation of transferring its assets or legal proceedings from a member state to another in order to benefit of a more favourable treatment *("forum shopping")* and, for reaching such objective the following common rules are established regarding the court competence and decision making that directly apply to this procedure, including provisions on the recognition of these decisions, the applicable law and the obligatory law and the obligatory coordination of the procedures that have been opened in several member states.

Upon the Regulation adoption, there was considered that a sole procedure would not be indicated for the entire community, thus, the combined the theory of the bankruptcy specificity with the territoriality of the same.

A main procedure of bankruptcy is admissible under the condition that it can be initiated in the member state on whose territory the main interests of the debtor are centred, the and a secondary procedure of bankruptcy can be initiated in any member state on whose territory the debtor has an undertaking, the effects of such a procedure limiting to the member state where the undertaking is carrying out its assets in that state.

As above-indicated, the Regulation is limited to establishing the international jurisdiction, appointing those member states whose jurisdiction allows the initiation of the bankruptcy procedure, the territorial jurisdiction within that member state being further established to be the national law of that state.

The competent jurisdictions must be able to take the provisional and conservation measures on the very moment of opening the procedure.

The competent court for opening the main procedure of insolvency is that member state on whose territory the main interests of the debtor are centred. In case of a company or legal entities, the centre of the main interests is presumed to be, until proven differently, the place where the main headquarters are located. The Romanian law no. 637/2002 completes this legal assumption establishing that, the centre of the debtor's main interests is, until proven differently, as the case may be: the main office of the legal entity, the professional domicile of the individual entity carrying out an economic activity or an independent profession, the residential address of an individual entity that does not carry out an economic activity or an independent profession.

[4]Jerome Carriat, The Council Regulation 1346/2000 on Insolvency Proceedings, http://ec.europa.eu/enterprise/entrepreneurship/support_measures/failure_bankruptcy/conference/carriat_slides.pdf (ultima vizualizare la 10 decembrie 20100;

It is extremely important the fact that, the Regulation establishes the difference between the centre of the main interests of a debtor and its registered office, possibility that has been developed based on the jurisprudence by the European Union Court of Justice (Court decision on 9th of March 1999, C-212/97, Centros[5] and the Court decision on 30th of September 2003, C-167/01 Inspire Art, Rec. 2003 p. I-10155[6]), closely related to the possibility of transferring a company headquarters to another member state different from the original incorporation state, based on the right of establishment (Court decision on 16th of December 2008, C-210/06, Cartesio, Rec. 2008 p. I-09641[7]).

Obviously, the law of the member state opening the procedure –law applicable to this procedure – determines also the effects of such procedure.

As a rule, prior to opening a main procedure, no secondary procedure can be initiated in another member state on whose territory the debtor has a working unit, unless, the debtor either has local lenders, or lenders with a debt occurred from the exploitation of that working unit, or the main procedure cannot be initiated due to the conditions set by the law of the member state, competent for opening the main procedure.

Nevertheless, when a main procedure is opened, all the territorial procedures become secondary.

Besides protecting the local interests, the opening of a secondary procedure can be justified also by the overly complex patrimony of the debtor or by the significant difference between the incidental legal systems, which might create complex difficulties by extending the effects of the main procedure over the territory of other states.

For the proper administration of the insolvency procedure, the bankruptcy judge of the main procedure can request the opening of secondary procedures and, in this case, between the bankruptcy judges involved in all the initiated procedures, strict activity coordination actions must be established.

For a proper equality of treatment of the insolvent debtor's lenders the establishment and compliance with the principle according to which any lender having the headquarters or the

---

[5] European Court, Case C-212/97, Judgment of the Court of 9 March 1999; Centros Ltd v Erhvervs- og Selskabsstyrelsen; Reference for a preliminary ruling: Højesteret - Denmark; Freedom of establishment - Establishment of a branch by a company not carying on any actual business - Circumvention of national law - Refusal to register; available at: <<http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61997J0212&lg=en>>;

[6] European Court, Case C-167/01, Judgment of the Court of 30 September 2003, Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd., Reference for a preliminary ruling: Kantongerecht te Amsterdam - Netherlands; Articles 43 EC, 46 EC and 48 EC - Company formed in one Member State and carrying on its activities in another Member State - Application of the company law of the Member State of establishment intended to protect the interests of others; European Court reports 2003 Page I-10155; available at: << http://eur-lex.europa.eu/Notice.do?val=277831:cs&lang=ro&list=277831:cs,277660:cs,277685:cs,&pos=1&page=1&nbl=3&pgs=10&hwords=>> (last visited on December 10th 2010);

[7] European Court, Case C-210/06, Judgment of the Court (Grand Chamber) of 16 December 2008; CARTESIO Oktató és Szolgáltató bt.; Reference for a preliminary ruling: Szegedi Ítélőtábla - Hungary; Transfer of a company seat to a Member State other than the Member State of incorporation - Application for amendment of the entry regarding the company seat in the commercial register - Refusal - Appeal against a decision of a court entrusted with keeping the commercial register - Article 234 EC - Reference for a preliminary ruling - Admissibility - Definition of 'court or tribunal' - Definition of 'a court or tribunal against whose decisions there is no judicial remedy under national law' - Appeal against a decision making a reference for a preliminary ruling - Jurisdiction of appellate courts to order revocation of such a decision - Freedom of establishment - Articles 43 EC and 48 EC; available at: << http://eur-lex.europa.eu/Notice.do?val=484894:cs&lang=cs&list=484894:cs,470901:cs,&pos=1&page=1&nbl=2&pgs=10&hwords=&checktexte=checkbox&visu=>> (last visited on December 10th 2010);

residence in a member state is entitled to declare its debt in any of the insolvency procedures initiated against the debtor and the need to coordinate the allotments from the debtor's patrimony are mandatory actions.

In this sense, any lender will be able to withhold what it /he has been given, but shall no longer be able to receive any amount of money until the lenders of the same rank shall have received an equal share of indemnity.

Moreover, as soon as a bankruptcy procedure is open, the bankruptcy judge has the obligation to individually inform each known lender with the registered office or residence in a member state, as well as to publish the essential content of the procedure initiation in both the Official Journal of the EU, as well as in the Official Monitors of all the member states, however, such publication not representing a condition of the immediate recognition of the bankruptcy procedure.

And last, but not least, the law applicable to the insolvency main procedure and to its effects is the law of the member state on the territory of which has been initiated the main procedure of bankruptcy and the applicable law to the secondary proceedings is the law of the member states on the territory of which the secondary procedures have been initiated.

In this context, the law of the origin state where the bankruptcy procedure has been initiated determines the conditions for opening, developing and closing the insolvency procedure.

A major principle of this European regulation is the one of immediate recognition - without further formalities – of all the decisions made by the tribunal of the competent member state for the main procedure, in the other member states.

The cross-border insolvency regulation pattern offered by the European Regulation is the one of a mixed system where the territoriality of the bankruptcy occupies a highly important role and the procedure universality reflects, in a legal manner, through the coordination of the secondary procedures by the main one, through the close cooperation between the bankruptcy judges involved in all the procedures, through the equal treatment of the lenders and through the recognition of the effects of bankruptcy procedures in all the other member states.

III. The need to harmonize the European insolvency laws

3. The harmonization of the European law at the EU level must be discussed and analyzed from the perspective of the problems generated by the cross-border insolvency and of the main cause of the same: significant disparities between the existing insolvency laws, at the level of the member states.

On the other hand, the comparative law analysis of an essential aspect of the insolvency: the admissibility conditions for opening the insolvency procedure, represents a necessary action for outlining the disparities between the existing insolvency laws at the level of the member states and for supporting the need to harmonize the European laws in the insolvency matter.

Equally important is also the illustration of the practical aspects, of the cross-border insolvency cases with an accent on those involving Romanian legal entities and Romanian citizens, as well as on those settled by the competent Romanian courts.

A) The causes for the main practical problems of cross-border insolvency at the EU level

4. As always, the reality represents the harshest test for the legislation, and, from this point of view, the cross-border insolvency could not be an exception to the rule.

INSOL Europe[8] has undertaken an essential role in the difficult process of identifying the existing problems and those that can occur directly or indirectly in relation to the cross-border insolvency procedure, and last, but not least in relation with the insolvency laws harmonization propositions at the EU level.

For this purpose, upon the request of the Commission for Legal Affairs of the European Parliament, a group of experts had accomplished the Report called "Harmonization of the insolvency laws at the EU level "[9] (hereinafter referred to as, INSOL Europe Report), which identified and outlined the "disparities between the national insolvency laws, which can create obstacles, competitive advantages, and/or disadvantages, and difficulties for companies having cross-border activities or ownership within the EU. In particular, it provides a list of problems which might occur in the absence of common rules on insolvency, such as problems related to insolvency of corporate groups, liability of shareholders being nationals of different Member states, reference to national laws for the insolvency of "Community" companies and strategic cross-border movements for insolvency purposes. In addition, the note identified a number of areas of insolvency law where harmonization at EU level is worthwhile and achievable. Lastly, it evaluates to what extent harmonization of insolvency law could facilitate further harmonization of company law in the EU. "[10].

The use of the country reports from Poland, France, Great Britain, Germany, Spain, Italy and Sweden, as well as of the materials in The Netherlands and Belgium, allowed the authors of the INSOL Europe Report to perform a complete analysis of European insolvency and to reach the purpose of assessing whether the harmonization of the insolvency laws at the European Union level is necessary or it is worthwhile to be performed, as well as to establish whether the drafting and implementation of common norms in the insolvency matter can facilitate the harmonization of the company laws in European Union.

This double concern is justified by the intrinsic relation between the two matters, being known the fact that the companies, whether national or community companies, represent the main actors of the economic activity and, implicitly, of the insolvency procedures.

From the INSOL Europe Report perspective, the main cause of the practical problems generated by the cross-border insolvency is represented by the major disparities in insolvency laws, under the aspect of substantive laws, existing at the level of the EU member states.

Acknowledging the two aspects of the companies mobility principle: the possibility of changing the actual business centre of a company and its registered office from one Member State to another, the existence of different admissibility conditions for opening the insolvency procedures and for entailing the liability of the directors, shadow directors, shareholders, stockholder, lenders, and other associated parties of the debtor, can determine the amendment of the insolvency regime applicable to the company, in the attempt of obtaining a more favourable legal situation (forum shopping).

On the other hand, the existence of different classifications of the lenders decreases the predictability of the results that can be obtained by the same, the lack of coordination instruments

---

[8] INSOL Europe, The professional association for European restructuring and insolvency specialists; http://www.insol-europe.org/;

[9] European Parliament Report: Harmonisation of Insolvency Law at EU Level, member contributors : Giorgio Cherubini (Italy), Neil Cooper (UK), Daniel Fritz (Germany), Emmanuelle Inacio (France), Guy Lofalk (Sweden), Miriam Mailly (France), David Marks QC (UK), Anna Maria Pukszto (Poland), Barbara F H Rumora Scheltema (The Netherlands), Robert Van Galen (The Netherlands), Miguel Virgos (Spain), Bob Wessels (The Netherlands), Nora Wouters (Belgium), (INSOL EUROPE), disponibil la: <<http://www.insol-europe.org/eu-research/harmonisation-of-insolvency-law-at-eu-level/>> in limba engleza si la: <<http://www.juridice.ro/122375/armonizarea-legislatiei-privind-insolventa-la-nivelul-uniunii-europene-bucuresti-26-noiembrie-2010.html>> in limba romana;

[10] Raportul Insol Europe -op.cit. rezumat;

for the insolvency procedures related to companies, different legal entities, from the same corporate group, inexistence of some database at the EU level, including the court decisions and the relevant court orders sentenced in the cross-border insolvency cases prevents the efficient administration of the insolvency procedures.

For summing up, by analysing and reflecting on the practical problems of cross-border insolvency, the INSOL Europe Reports considers that the following aspects related to the insolvency laws must be harmonized at the EU level:

i. Eligibility and criteria for opening the insolvency procedure;

ii. General stay on the lenders powers to assert and enforce their rights after the commencement of the insolvency and reorganization proceedings;

iii. The rules related to the management of the insolvency proceedings;

iv. The ranking of lenders.

v. The rules regarding the process of filing and verification of the lenders claims.

vi. The responsibility for the proposal, verification, adoption, modification and contents of the reorganization plans.

vii. The scope of the assets undergoing the insolvency procedure.

viii. The rules on cancelling the transactions concluded prior to opening the insolvency procedure (avoidance actions).

ix. The termination of the contracts and the rules as to the mandatory continuation of contracts execution.

x. The liability of the directors, shadow directors, shareholder, lenders, and other parties associated to the debtor.

xi. Provisions regarding the post-commencement finance.

xii. The qualifications and eligibility of the practitioners for the appointment as insolvency representatives, different rules of licensing, regulation, supervision, and professional ethics and conduct.

xiii. Coordination of the insolvency procedures in relation to companies belonging to a group of companies.

xiv. The need for a European database of the court orders and judgments.

xv. The scope of the EC Regulation no. 1346/2000.

All these harmonization directions of the insolvency laws represent, in fact, divergent aspects of the MSs laws and, concurrently, causes for the practical problems of cross-border insolvency that must be eliminated by uniform legal instruments in the matter of insolvency.

B) Eligibility and insolvency procedure initiation criteria at the EU Member states level - problematic aspect of cross-border insolvency

5. The most correct outline of the existing disparities between the EU member states laws, illustrated by means of comparative analysis of one of the main aspects of the insolvency, respectively, of the admissibility conditions for opening the insolvency procedure, such as they are established by the laws of the major European states and by the laws of our country.

This problematic must be also analysed with priority in the INSOL Europe Report, under a different form: "The eligibility and the criteria for opening the insolvency proceedings", including here both aspects related to the financial situation of the debtor by reference to the use of two different criteria: "the liquidity test (the ability to pay the debts upon their maturity date) or the balance sheet test (the assets surplus in relation to the liabilities)"[11] as well as aspects related to the capacity of certain entities and persons to call forth the bankruptcy law.

[11] INSOL Europe Report, op.cit., point I (i);

5.1. From the point of view of the objective substantive condition, of the financial status of the debtor, the legislative differences are significant.

In France, "cessation of payments" (cessation des paiements) is the main cause[12] for applying the procedure for legal redress and dissolution[13] .

The meaning of the notion: debtor under cessation of payments represents the inability of the debtor to cover the liabilities from the due or available assets ("s'il est dans l'impossibilite de faire face a son passif exigible avec son actif disponible" – art.88 of the Law no. 2005-845 in July 26th, 2005) according to the definition under art. L. 631-1 of the C.com.fr., definition used also in the Ordinance no. 2008-1345 / December 18th 2008[14], not being required for the commercial company to find itself in a desperate or irremediably compromised situation[15].

The legal definition of cessation of payments – subject to criticisms either for the ambiguity of the used notions[16] or for its rigidity[17]- occurs after the jurisprudence succeeded in determining an exact content to this notion, the great advantage of this regulation is considered to be the clear demarcation of the notion of cessation of payments of the insolvency notion[18], the cessation of payments being separate from the insolvency notion[19].

By the amendment of the French laws of insolvency achieved by the Law no. 2005-845 on July 26th 2005 – there have been eliminated the situations in which the debtor's cessation of payments did not represent a condition for opening the collective procedure.

Thus, by January the 1st 2006, the collective procedure for legal redress and dissolution could have been done without the compliance of the condition for the cessation of payments, under the following three situations:

i. against the one that did not comply with a financial obligation undertaken on the occasion of an amiable settlement concluded with its lenders;

ii. against the trader carrying out a business operated under lease ("location gerante"[20]) during a legal redress procedure and does not comply with the obligations acquired by the conditions established through the assignment plan authorized by the judge there shall be opened a legal redress procedure without the cessation of payments to be ascertained;

---

[12] G.Ripert/R.Roblot, Philippe Delebecque, Michel Germain, Traite de Droit Commercial, Tome 1, 17e edition, L.G.D.J., Paris, 2000, no. 2872, p.855;

[13] Regulated in France under the Law on January 25th 1985;

[14] The Ordinance no. 2008-1345 / December 18th 2008 on the reform of law for the companies in difficulty and the Decree no. 2009-160/ February 12th 2009 for applying the reform ordinance; In this sense, see: Pierre-Michel Le Corre, La reforme du droit des entreprises en dificulte – Comentaire de l'Ordonnance du 18 decembre 2008 et du decret du 12 fevrier 2009, Dalloz, Paris, 2009, p.209; Jean-Pierre Le Gall, Caroline Ruellan, Droit Commercial, Notion Generales, Dalloz, Paris, 2008, p.167;

[15] Yves Guyon, Droit des Affaires, Tome 2 - Entreprises en difficultes, Redressement Judiciaire-Faillite, 7e Edition, Economica, Paris, 1999, nr.1121, p.141; G.Ripert/R.Roblot, Philippe Delebecque, Michel Germain, op.cit., nr.2873; Cass.com., 14 fevrier 1978, Bull.cass., 4, nr.66;22 fevrier 1994, RJDA, 1994, 662 s.a.; Code des procedures collectives- Commente, 5e edition, Dalloz, 2007, p.16;

[16] Veronique Martineau-Bourgniaud, Cessation of payments. Fundamental notion in Revue trimestrielle de droit commercial et de droit economique, April /June 2002, no. 2, Ed.Dalloz, Paris – in fact the topic is the content of the cessation of payments components: the available assets and liabilities not provided under the law;

[17] Yves Guyon, op.cit., no. 1117, p.135;

[18] Michel Jeantin, Paul Le Cannu, Droit commercial. Instruments de paiement et de credit. Entreprises en difficulte, 5e Edition, Dalloz, Paris, 1999, nr.594, p.383;

[19] Code des entreprises en difficulte, Commente sous la direction de Corinne Saint-Alary Houin, premiere edition, LexisNexis, Litec, Paris, 2007, p.250 and the quoted decisions;

[20] Location-gerance / business operated under lease of the goodwill is considered a lease of an incorporeal movable property, details: Jerome Huet, Traite de Droit Civil sous la direction de Jacques Ghestin, Les principaux contracts speciaux, 2 e edition, L.G.D.J., Paris, 2001, n.21116, p.689;

iii. when the debtor fails to execute its financial obligations undertaken by the continuation plan, the tribunal orders the plan's resolution and opens a new economic redress procedure without the cessation of payments to be required[21].

The elimination of these causes for opening the reorganization and legal winding-up procedure has been requested by the specialized literature which considers that, these exceptional situations should be abated, the payments termination becoming the only cause necessary for the opening of the collective procedure, as the legal redress of the debtor is a remedy, not a sanction[22].

In Germany, the German Insolvency Code (Insolvenzodnung (InsO) adopted in October 1994 and effective as of January 1st 1999, defines the insolvency notion, but introduces a new concept for the continental law system of "imminent payment inability" as cause for opening the insolvency procedure.

Thus, it is established that the opening of the insolvency procedure is subordinated to the existence of the cause for opening (art 16 InsO), the insolvency represents the general cause for procedure opening (art.17 para.1 InsO) the debtor being in insolvency if it fails paying the debts, the insolvency being presumed when the debtor ceases the payments (art.17 para.2 InsO). In fact, it is about the debtor's incapacity to cope with the debts due lacking the necessary liquidities.

As a general rule, a commercial company shall be considered unable to pay its duties if it fails to pay 80% - 90% of its debts in 2- 3 weeks after becoming due.

As for the imminent payment inability, as a special cause for procedure opening, the German law leaves with the debtor to assess its imminent inability to pay (subjective criterion), being able to request the opening of the procedure when the debtor believes it cannot pay its existing debts upon maturity date (art.18 InsO).

The German law also establishes another special cause for opening the procedure, applicable exclusively to the legal entities: the excess of debts / over-indebtedness (surendettement) existing when the patrimonial assets of the debtor fail to cover the existing debts.

Therefore, in Germany there are causes for opening the insolvency procedure:

i. payment inability;

ii. imminent payment inability;

iii. excessive debt[23].

In Italy, the article5 of the Royal Decree no.267 of 16th of March 1942[24] defines the insolvency as a state manifested as the failure to comply with the obligations or other external actions, demonstrating that the debtor is not able to pay regularly its obligations, state that can initiate the bankruptcy procedure opening.

---

[21] G.Ripert/R.Roblot, Philippe Delebeque, Michel Germain, op.cit., p.855;

[22] Yves Guyon, op.cit., nr.1123 – 3), p.144

[23] The notion "*surendettement*"- *excessive debt* (*indebted)* is original and we also fiind it in the French law. It is not the same as cessation of payments or insolvency. It can exist an *active indebtedness* regarding the persons with excessive debts as they applied for loans based on their possibility reimburse it and passive indebtedness in the case of the persons without sufficient resources for covering acoperirea cheltuielilor indispensabile (curente)- Yves Guyon, op.cit., nr.1108, p.124-125; G.Paisant, *"La reforme de la procedure de tratement du surendettement par la loi du 29 juillet 1998 relative a la lutte contre les exclusion",* Revue trimestrielle de droit commercial et economique, 1998, 743; The need to regulate this cause for insolvency procedure application in our country in Gheorghe Piperea, *"Despre ncesitatea extinderii procedurii insolventei la simpli particulari pentru supraindatorare",*published in Probleme actuale ale dreptului bancar, Ed.Wolters Kluwer, 2008;

[24] The Royal Decree no. 267 / 16th of March 1942 - published in the G.U. no. 81 / 6th of April 1942, Supplemento Ordinario – has been successively amended through the Law Decree no.35 /14th of March 2005 transformed in the Law no. 80/May 14th, 2005, by the Law Decree no. 5/January 9th 2006 and by the Legislative Decree no.169 / September 12th 2007;

In the light of these legal provisions, the insolvency state is identified with the inability to comply with the due obligations upon the maturity date, by using the normal means, the situation of the debtor's patrimony being irrelevant even if the assets are bigger than the liabilities[25].

By this definition of insolvency the "external actions" showing the state of insolvency are indicated; however, the insolvency can manifest also by internal actions, known by the entrepreneur alone, being in the presence of a "asymptomatic"[26] insolvency that will form the grounds for opening the procedure by the debtor.

Spain, by the Law no.22/2003 – the so called concurrence law - adopted in July 2003 and entered into force on September 1st 2004, replaces the old law regarding the bankruptcy procedure and also establishes the notion of imminent insolvency, as cause for opening the collective procedure upon the debtor's request.

Until the adoption of the Law no. 22/2003, the Spanish law made the distinction between the bankruptcy (quibera) and payment suspension (suspension de pagos) however, presently, the state of insolvency alone is defined (concurso).

Thus, according to the Spanish law vision the debtor is insolvent when he/it cannot pay regularly its due and payable debts [27] (art.2 para.2 Law 22/9th of July 2003 Concursal).

The debtor's insolvency is presumed to be in favour of the lenders when:

i. the attempt to recover an asset based on an enforcement title has failed;

ii. the current payments have been suspended, and there is a seizure affecting the debtor's assets;

iii. in case of fraudulent bankruptcy or accelerated liquidation of the debtor's assets;

iv. there is a generalized failure to comply with the certain debts, such as: taxes, social insurances, or salaries.

In Romania, the Law no.85/2006 on the insolvency procedure[28], preserves both the condition for opening the collective procedure: the insolvency, defined as: *"that state of the debtor's patrimony characterized by the insufficiency of funds available for the payment of the certain, liquid, due and payable debts" (art.3 pct.1 of the Law no. 85/2006). The minimum quantum of the debt is RON 45,000, and for employees, of 6 national average gross wages /per employee.*

The novelty of the current regulation is defining the legal state of imminent insolvency and the cause for opening the collective procedure.

The insolvency is imminent when *it is proved that the debtor shall not be able to pay upon due date the due and payable debts he undertook, from the available funds available on the maturity date* (art.3 pct.1, let. b of the Law no. 85/2006).

5.2. At the level of the Member States there are major disparities also as far as concerning the second substance - subjective and admissibility-related – condition of applying the insolvency procedure, which is related to the debtor's capacity or, as indicated in the INSOL Europe Report:

---

[25] Barbara Ianniello, Il nuovo diritti fallimentare, Guida alla riforma delle procedure concorsuali, Giuffre, Milano, 2006, p.11;

[26] Francesco Meloncelli, La Conoscenza dello Stato D'Insolvenza nella Revocatoria Fallimentare, Giuffre, Milano, 2002, p.107-11;

[27] Alberto Palomar Olmeda, La Normativa de insolvencia en Espana, http://ec.europa.eu/enterprise/entrepreneurship/support_measures/failure_bankruptcy/conference/palomar_slides.pdf

[28] Law no. 85/05.04.2006, on the insolvency procedure, published in the Off. M., Part I no. 359/21.04.2006, as further amended and completed;

"of the capacity of certain entities or persons to call forth the laws on bankruptcy, which have serious effects on the final remedy, presumed to be the formal insolvency procedure "[29].

The European laws have the tendency to enlarge the scope of the insolvency procedure, trend illustrated under the pct. 9 of the preamble of the European Regulation no. 1346/2000 on the insolvency procedures by which it is indicated that, this regulation should apply to the insolvency procedures regardless whether the debtor is an individual or a legal person, a trader or a private person.

In France, the reformation started by the Law adopted on July 13th 1967, based on which the collective procedure applies also to the private law legal entities performing an economic activity, continuing successively, with the inclusion of the handicrafts – by the Law of January 25th 1985 -, regarding the farmer – under the Law of 30th of December 1988- and, of the individual persons exercising an independent professional activity, a liberal profession – by the Law of 26th of July 2005-.

Obviously, the economic activity – whose area has been expanded – carried out by the non-traders represents the support for applying it to the collective procedure.

According to the German Code of Insolvency (Insolvenzordnung –InsO) adopted on the 5th of October 1994[30], the insolvency procedure can be opened in relation to the patrimony of all the individual and legal entity, - the association without legal capacity being considered for this purpose as a legal person – as well as to the patrimony of a company with no legal capacity (the unlimited company, limited partnership, partnership, civil company, shipping company, European economic interest group) without no other additional subjective condition.

In Italy, the entrepreneurs performing a commercial activity, except for the public companies and small enterprisers, (art. 1 of the Decree Law no.5 / January 9th 2006[31]), as well as the farmers[32] (that do not carry out commercial activity under art. 2195 art.1 of the It. com. c.) and the law offices (art.16 para.3 of the Decree Law no. 96/February 2nd 2001) are subject to the provisions regarding the write-off and the bankruptcy.

Small enterprisers are not those performing a commercial activity, individually or collectively, that, even if alternatively: a) have carried out capital investments in value exceeding Euro 300,000; b) have registered, by any means, a gross calculated profit, as the average of the last 3 years from the activity start-up, if such period is lower than 3 years, in annual overall exceeding Euro 200,000;

The Spanish law in July 9th 2003 regarding the concurrence reform establishes that, the concurrence procedure applies to all the debtors, individual or legal entities.

In Poland, the Law of 28th of February 2003 on bankruptcy and economic redress applies solely to the entrepreneurs debtors. In the sense of the Polish law, the entrepreneurs / undertakers are: all the individual persons, legal persons, all the entities with no legal capacity to whom a special law confer legal capacity, performing an economic or professional activity[33].

In Romania, according to the Law no. 85/2006, the debtors in the insolvency procedure are the individual or legal entities of private law, included in the categories of debtors - traders and non-traders-, subjected to the general or simplified procedure of insolvency.

In other words, the Romanian law opts for the indication of the categories of persons subjected to the insolvency procedure in a less classic way, from the perspective of the two types

[29] Ibidem, pct.I (iii):
[30] For the German Insolvency Code in English: http://www.iuscomp.org/gla/statutes/InsO.pdf;
[31] Decree Law no.5 / Janury 9th 2006 published in Gazzetta Ufficiale no.12 / January 16th 2006;
[32] Gian Mario Perugini, Il Patrimonio nel Fallimento, In base alle nuove Leggi di Riforma, Giuffre, 2006, p.5-6;
[33] Polish law of 28.02.2003 on bankruptcy and redress written in French language and translated by Daniela Borcan and Monika Bogucka, in www.juriscope.org;

or means of achievement of the insolvency procedure: the general procedure and the simplified procedure indicating these categories of persons within each procedure.

In Romania, there are subjected to the insolvency procedure: the commercial companies, the unlimited companies, the cooperative companies, cooperative organizations, farming companies, economic interest groups, any other legal private entity, performing economic activities, traders - individual entities, trader – individual entity holder or member of an individual or of a family undertaking.

6. This comparative law analysis illustrates the fact that the, "the liquidity test seems to be the most commonly used test in the EU Member States and is in line with the United Nation Commission on International Trade Law (UNCITRAL) Legislative Guide on Insolvency Law.[34] However, differences exist in defining how much indebtedness must be due for an insolvency or reorganization proceeding to be opened and in reconciling other entry criteria applied by Member States.

As Member States apply different tests, in some cases companies will not be able to open main proceedings, but they may open territorial proceedings, in other cases they may open main proceedings and may, by virtue of Article 27 of the Regulation no. 1346/2000, open subsequent territorial proceedings in Member States where they do not meet the domestic insolvency test."[35]

And last but not least, by the regulation differences existing at the level of the member states regarding the possibility of certain individual or legal persons to be declared insolvent, it reduces the possibility of using the insolvency procedure as formal procedure of remedying the financial situation of the actors acting on the domestic market.

C) Practical aspects of the cross-border insolvency practice

7. We showed in the beginning of this paper that the mobility of the commercial companies and of the individuals performing economic or professional activities (materialized in the possibility to move the registered office from one member state to another) and the possibility to have a centre of main interests differed from the registered office are aspects generating or that shall generate the main problems when opening, developing and closing the insolvency procedures.

Closely related to these aspects there is also the principle established under the Regulation, according to which the laws of the state hosting the debtor's centre of the main interests, are those determining the conditions for opening, developing and closing the insolvency procedure.

Thus, although the law governing the legal articles of association of a commercial company is the law of the country on the territory of which the registered office has been established, the governing insolvency law applicable to this entity can be a different law than the one applicable to the articles of association of the company.

> These forms of free establishment of the registered office determine a possibility occurred from the change of main interests centre of a company, as well as the option of moving the registered office, and, thus, of amending the insolvency regime applicable in relation to the relevant society.

The courts in our country had relatively few cases of cross-border insolvency pending with them for settlement, and settled by applying the Regulation.

---

[34] The full text of the Legislative Guide on insolvency law of UNCITRAL is available at: <<www.uncitral.org>>;
[35] INSOL Europe Report, op.cit., pct.I (i);

In this sense, in the case of the debtor MKJV Ld. Newpark – Bucharest Branch, limited liability company with the registered office in Newpark, Irland, Bucharest Tribunal 7th Commercial section[36], ordered the opening of the insolvency procedure with the exclusion of the Regulation incidence on the procedure. The decision has been cancelled by the second appeal court, the Court of Appeal Bucharest, which established the Regulation application in the case and decided that no relevant proofs have been submitted based on which to result that the debtor has the centre of the main interests in Romania for allowing the opening of a main insolvency procedure[37].

In a different cause, the Bucharest Tribunal approved the opening of a secondary insolvency procedure regarding the Romanian-based branch of a commercial company with the registered office in Istanbul (Turkey)[38], court decision cancelled by the superior court. However, subsequently, a new insolvency procedure against the same has been requested by another lender, however, this time, the court decision allowing the opening of the procedure has been sustained and remained enforceable, the debtor agreeing on the procedure opening[39].

In Spain, on May 30th 2008, the Court of first instance in Logrono, has passed a court decision on the voluntary bankruptcy of two individual entities, Romanian citizens, establishing itself as competent for declaring the bankruptcy, such jurisdiction being based on the centre of main interests of the two debtors, the place where the debtors usually perform their activity, although, the registered office of the two was in Santo Domingo de la Calzada.

By the court decision passed on 22nd of April 2009, the Tribunal of Macerata, Italy, declare the bankruptcy of S.C.I.T.S.R.L., commercial company with the current registered office in Bucharest, Romania the court expressly establishing its jurisdiction, based on the previous existence of the registered office in Civitanova Marche, Italy.

The same Tribunal of Macerata, Italy, passed the court decision no. 46/5th of November 2008 declaring the bankruptcy of S.C.R.S.R.L., with the registered office in Salonta, Romania however, this court decision has been cancelled due to procedural reasons on 19th of May 2009 by the Court of Appeal in Ancona.

On January 14th 2009, the High Court of Justice in London, England – Department of the Lord Chancellor, the Company Court, issued an order for opening the main insolvency procedure against S.C. N.N.R. S.R.L., company having its registered office in Bucharest, Romania. The Court decided that the main centre of interests of N.N.R., in the sense provided by the Regulation is in England.

In another cross-border insolvency case involving a Romanian company, the Tribunal for Civil Cases in Graz has decided in 9th of June 2008 the opening of the insolvency procedure for the patrimony of the AR SRL company, with the registered office in Bucharest, Romania and with the centre of main interests of the company in Graz (Austria).

On October the 20th, 2009, the Commercial Court in Paris has been applied a very special settlement modality to a bankruptcy case. Thus, based on the insolvency statements submitted for the opening of insolvency procedure, concurrently by: the parent company – with the registered office in Paris – and its subsidiaries: LE SL – company with the registered office in Barcelona (Spain), Oy SRL – company with the registered office in Bentivoglio (Italy) and Ox SRL with the registered office in Sibiu, Romania have decided to open the insolvency procedure on all the above-mentioned company.

[36] Bucharest Tribunal, 7th Commercial section, com. judgment no.5020/26.10.2009, not published;
[37] Court of Appeal Bucharest, 6th Commercial section, com. court decision no.1082/14.09.2010, not published;
[38] Bucharest Tribunal, 7th Commercial section, com. judgment no.3674/25.06.2009, not published;
[39] Bucharest Tribunal, 7th Commercial section, com. judgment no.5814/19.11.2009, not published;

For passing this court decision, the Commercial Court in Paris has held that, from the illustrated facts, it results a set of clues according to which the centre of the main interests (according to art.3 let.1 of the (EC) Regulation no.1346/2000 of the Council) of the group of companies was in France. Considering that the insolvency of the parent company had triggered, consequently, the insolvency of all its subsidiaries, it is hereby demonstrated the total absence of financial autonomy of these companies. It is deemed that, the lenders of these subsidiaries considered that the solvability of their debtors and/or the return of their contribution depend largely on the financial situation of the parent company. And, eventually, considering the financial and operational interdependency existing among the group's companies, drafting a correct reorganization plan for the group entails automatically the opening of one insolvency procedure for all the four companies, in France – the state where the centre of the main interests of these companies is located.

These are few situations directly involving Romanian legal entities and Romanian citizens in cross-border insolvency proceedings, and that indicates the fact that the problems of the disparities between the insolvency laws existing at the level of the EU is of interest for our country too.

In this context, the aspects related to the means of reconciliation of the disparities of insolvency laws with the permanent economic integration and, thus, with the continuously increasing cross-border movements and activity of the EU-based companies are of major importance.

IV. Means of harmonizing the European insolvency laws

8. The harmonization of the European laws on insolvency must be carried out based on an European academic project drafted by an international academic network, project that would propose the most adequate means for harmonizing the European laws on insolvency, by means of an instrument responding to the problems regarding the diverging laws, and without introducing extra administrative tasks, shaped in a politically agreed form thus as to be accomplishable.

The INSOL Europe report, whose conclusions we agree upon, the commission of experts on insolvency law composed of renowned professors, researchers and practitioners of law, established that: "There is a limited number of areas where the harmonization may be desirable and achievable. These area are, principally, the following: a possible common test of insolvency as a requirement of a formal insolvency process; the formal aspects of lodging and dealing with the claims in a formal insolvency; certain aspects of the manner in which the reorganization plans are adopted and their contents; the rules regarding so-called detrimental acts and the interrelationship between contractual rights of termination and insolvency; and finally director's responsibilities. However, even these areas are affected by non-insolvency laws considerations. Therefore, any further consideration of reform in an insolvency law context will have to take into account other important areas that are or may be the subject of European law amendment and reform such as general company law"[40].

The completion of the Regulation with uniform substantive law might be considered however, we think that, in this stage of problems in harmonizing the insolvency laws, a regulation for establishing a European insolvency law might entail delicate problems regarding subsidiarity and proportionality of these harmonization means.

The replacement of the plurality of domestic laws with a single mandatory set of rules, under the form of the regulation or directive, might not be a proportional measure for eliminating

[40] INSOL Europe Report, op.cit., Report Summary;

the internal market barriers "where the disparities between the national insolvency laws and restructuring create obstacles, competitive advantages and /or disadvantages and difficulties for companies having cross-border activities or ownership within the EU"[41].

We believe that an instrument that has no mandatory nature might improve the coherence of the European Union law in insolvency matter.

The use of a regulation creating an optional instrument of European insolvency law, conceived as "the second regime" in each member state or as the "28th regime" at the EU level, as it has been proposed in other matters intended to be harmonized at the European level, is not an option in the matter of insolvency considering the special statute of the regulations on insolvency. We consider the fact that, in most of the member states, the aspects related to the rules of insolvency substantive law enter the category of the imperative rules.

An instrument of European insolvency law could be attached to a recommendation of the Commission addressed to the member states, by which they should be encouraged to incorporate the legal instrument in their national law. Such a recommendation would allow the member states to gradually incorporate the instrument in their national laws, based on their own decisions, as a means that does not affect the law-making autonomy of the member states and would adequately answer the requirements of the subsidiarity principle.

In addition to this important aspect in supporting this option, the European Court of Justice would be competent to interpret the provisions of the recommendation that would form the object of the preliminary reference procedure to the ECJ, insuring thus a uniform application by the national courts.

The recommendation would encourage the member states to replace the domestic laws in the matter of insolvency with the instrument in discussion. In a similar method, that proved to be a success, have acted the United States of America where, the " Uniform Commercial Code[42], drafted by a group of experts and approved by the neuter, quasi-public organization [43], has been adopted by all the 50 states, except for one."[44]

Conclusions

No doubt, the practical problems, current and future, of the cross-border insolvency, determined by the significant disparities between the national laws in the insolvency matter, presented and analyzed in this paper, require the uniformization of the rules of substantive insolvency law at the EU level.

The harmonization of the insolvency laws at the EU level represent a necessary objective considering the advantages achieved by its drafting.

The lack of any differences of treatment in the insolvency matter, at the EU level, shall eliminate the lenders and third parties uncertainty and, in particular, the attempts to create or achieve a more favourable regime (forum shopping), shall generate a uniform court practice and last, but not least, a better functioning of the internal market.

---

[41] See INSOL Europe Report, op.cit., introduction;
[42] Uniform Commercial Code is available on:<< http://www.law.cornell.edu/ucc/ucc.table.html.>>;
[43] Uniform Commercial Code is frequently revised and approved by the Commission for uniform law, which has the purpose of drafting and promoting the adoption of uniform state laws, if the uniformity is practical and desirable, as well as by The American Law Institute, drafting influential academic papers for clarifying, modernizing and improving the laws;
[44] The Green Paper of the Commission on policy options for progress towards a European Contract Law for consumers and businesses, European Commission, Brussels, 1.7.2010, COM(2010)348 final, available at:<< http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0348:FIN:RO:PDF>>;

In this context, the harmonization of the European laws on insolvency shall be approached by drafting an European academic project by an international academic network, project proposing the most adequate measures for harmonizing the European laws on insolvency, by means of an instrument with a force responding best to the harmonization objective and a form politically agreed up thus as to be achievable.

References

- Jerome Carriat, The Council Regulation 1346/2000 on Insolvency Proceedings, available at: <<http://ec.europa.eu/enterprise/entrepreneurship/support_measures/failure_bankruptcy/conference/carriat_slides.pdf >> (last visited on December 10th 2010;
- Pierre-Michel Le Corre, La reforme du droit des entreprises en dificulte – Comentaire de l'Ordonnance du 18 decembre 2008 et du decret du 12 fevrier 2009, Dalloz, Paris, 2009, p.209;
- Jean-Pierre Le Gall, Caroline Ruellan, Droit Commercial, Notion Generales, Dalloz, Paris, 2008, p.167;
- Yves Guyon, Droit des Affaires, Tome 2 - Entreprses en difficultes, Redressement Judiciaire-Faillite, 7e Edition, Economica, Paris, 1999;
- Jerome Huet, Traite de Droit Civil sous la direction de Jacques Ghestin, Les principaux contracts speciaux, 2 e edition, L.G.D.J., Paris, 2001;
- Barbara Ianniello, Il nuovo diritti fallimentare, Guida alla riforma delle procedure concorsuali, Giuffre, Milano, 2006;
- L.Idot, C.Saint-Alary-Houin, Procedures collectives-Droit communautaire en gestion, J.-Cl.Europe, Fsc.871 citat in Michel Jeantin, Paul Le Cannu, Droit du Commerce International, 2e edition, Dalloz, Paris, 2000.**;**
- Michel Jeantin, Paul Le Cannu, Droit commercial. Instruments de paiement et de credit. Entreprises en difficulte, 5e Edition, Dalloz, Paris, 1999;
- Veronique Martineau-Bourgniaud, Incetare de plati. Notiune fundamentala in Revue trimestrielle de droit commercial et de droit economique, aprilie/iunie 2002, nr.2, Ed.Dalloz, Paris;
- Francesco Meloncelli, La Conoscenza dello Stato D'Insolvenza nella Revocatoria Fallimentare, Giuffre, Milano, 2002;
- Daniela Claudia Muntean, <<*Regulamentul European de insolventa – Tema centrala a Conferintei "Dezvoltari Actuale in legislatia falimentului" care a avut loc la Dubrovnik-Croatia, in perioada 16-18 noiembrie 2005*>>, in R.D.C. nr.3/2006;
- G.Paisant, *"La reforme de la procedure de tratement du surendettement par la loi du 29 juillet 1998 relative a la lutte contre les exclusion",* Revue trimestrielle de droit commercial et economique, 1998;
- Alberto Palomar Olmeda, La Normativa de insolvencia en Espana, disponibil la <<http://ec.europa.eu/enterprise/entrepreneurship/support_measures/failure_bankruptcy/conference/palomar_slides.pdf>>;
- Gian Mario Perugini, Il Patrimonio nel Fallimento, In base alle nuove Leggi di Riforma, Giuffre, 2006;
- Gheorghe Piperea, *"Despre necesitatea extinderii procedurii insolventei la simpli particulari pentru supraindatorare",* in Probleme actuale ale dreptului bancar, Ed.Wolters Kluwer, 2008;
- G.Ripert/R.Roblot, Philippe Delebecque, Michel Germain, Traite de Droit Commercial, Tome 1, 17e edition, L.G.D.J., Paris, 2000;
- I.Turcu, *"Creatia dreptului european al falimentului (II)",* R.D.C. nr.4/2001;

- Bob Wessels, *"Improving the operation of the EU Insolvency regulation",* Revista Romana de Drept al Afacerilor, Supliment, I/2007;
- European Court, Case C-212/97, Judgment of the Court of 9 March 1999; Centros Ltd v Erhvervs- og Selskabsstyrelsen; Reference for a preliminary ruling: Højesteret - Denmark; Freedom of establishment - Establishment of a branch by a company not carying on any actual business - Circumvention of national law - Refusal to register; disponibil la: <<http://eurlex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61997J0212&lg=en>>;
- European Court, Case C-167/01, Judgment of the Court of 30 September 2003, Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art Ltd., Reference for a preliminary ruling: Kantongerecht te Amsterdam - Netherlands; Articles 43 EC, 46 EC and 48 EC - Company formed in one Member State and carrying on its activities in another Member State - Application of the company law of the Member State of establishment intended to protect the interests of others; European Court reports 2003 Page I-10155; disponibil la: << http://eur-lex.europa.eu/Notice.do?val=277831:cs&lang=ro&list=277831:cs,277660:cs,277685:cs,&pos=1&page=1&nbl=3&pgs=10&hwords=>> (ultima vizualizare la 10 decembrie 2010);
- European Court, Case C-210/06, Judgment of the Court (Grand Chamber) of 16 December 2008; CARTESIO Oktató és Szolgáltató bt.; Reference for a preliminary ruling: Szegedi Ítélőtábla - Hungary; Transfer of a company seat to a Member State other than the Member State of incorporation - Application for amendment of the entry regarding the company seat in the commercial register - Refusal - Appeal against a decision of a court entrusted with keeping the commercial register - Article 234 EC - Reference for a preliminary ruling - Admissibility - Definition of 'court or tribunal' - Definition of 'a court or tribunal against whose decisions there is no judicial remedy under national law' - Appeal against a decision making a reference for a preliminary ruling - Jurisdiction of appellate courts to order revocation of such a decision - Freedom of establishment - Articles 43 EC and 48 EC; disponibil in: << http://eur-lex.europa.eu/Notice.do?val=484894:cs&lang=cs&list=484894:cs,470901:cs,&pos=1&page=1&nbl=2&pgs=10&hwords=&checktexte=checkbox&visu=>> (ultima vizualizare la 10 decembrie 2010);
- Cass.com., 14 fevrier 1978, Bull.cass., 4, nr.66;22 fevrier 1994, RJDA, 1994, 662 s.a.; Code des procedures collectives- Commente, 5e edition, Dalloz, 2007;
- European Parliament Report: Harmonisation of Insolvency Law at EU Level, member contributors : Giorgio Cherubini (Italy), Neil Cooper (UK), Daniel Fritz (Germany), Emmanuelle Inacio (France), Guy Lofalk (Sweden), Miriam Mailly (France), David Marks QC (UK), Anna Maria Pukszto (Poland), Barbara F H Rumora Scheltema (The Netherlands), Robert Van Galen (The Netherlands), Miguel Virgos (Spain), Bob Wessels (The Netherlands), Nora Wouters (Belgium), (INSOL EUROPE), available at: <<http://www.insol-europe.org/eu-research/harmonisation-of-insolvency-law-at-eu-level/>> in English language and at<<http://www.juridice.ro/122375/armonizarea-legislatiei-privind-insolventa-la-nivelul-uniuni-europene-bucuresti-26-noiembrie-2010.html>> in Romanian language;
- (EC) Regulation no.1346/May 29th 2000 on insolvency procedures, published in OJEC L 160/1 of 30.06.2000, p.143-160; available in Romanian language at:<< http://www.just.ro/Portals/0/CooperareJudiciara/LegislatieComunitara/1346%20insolventa.pdf>> (last visited on December 10th 2010);
- Law no. 637 of 07.12.2002 on the regulation of the international private law relations in the field of insolvency, published in the Official Monitor, Part I no.931 in 19.12.2002;
- Law no. 85/05.04.2006, on the insolvency procedure, published in the Official Monitor, Part I no. 359/21.04.2006, as further amended and completed;

- Code des entreprises en difficulte, Commente sous la direction de Corinne Saint-Alary Houin, premiere edition, LexisNexis, Litec, Paris, 2007;
- Ordinance no. 2008-1345 of December 18th 2008 regarding the reform of the law on companies in difficulty and the Decree no. 2009-160 of February 12th 2009 on the application of the reform ordinance;
- Italian Royal Decree no. 267 of March 16th 1942 - published in G.U. no. 81, April 6th 1942, Supplemento Ordinario, amended by the Decree Law no. 35 of March 14th 2005 transformed in the Law no. 80/May 14th 2005, by the Decree Law no. 5/January 9th 2006 and by the Legislative Decree no. 169 in September 12th 2007;
- German Code of Insolvency in English language: http://www.iuscomp.org/gla/statutes/InsO.pdf;
- Decree law no.5 of January 9th 2006 published in Gazzetta Ufficiale no.12 in January 16th 2006 (Italy);
- Polish Law of 28.02.2003 on bankruptcy and economic redress in French language translated by Daniela Borcan and Monika Bogucka, in www.juriscope.org;
- Legislative Guide on insolvency law of UNCITRAL, available at: <<www.uncitral.org>>;
- Uniform Commercial Code of the USA, available at:<< http://www.law.cornell.edu/ucc/ucc.table.html>>
- The Green Paper of the Commission on policy options for progress towards a European Contract Law for consumers and businesses, European Commission, Brussels, 1.7.2010, COM(2010)348 final, available at:<< http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0348:FIN:RO:PDF>>;