# BANKRUPTCY
# IN INTERNATIONAL TRADE RELATIONS

ABSTRACT of PhD thesis

ARGUMENT

The analysis of the theme "Bankruptcy in international trade relations" presents a particular interest in a theoretical plan, through the existing complex legislation.
The scientific approach involved conducting a comparative presentation of the rules belonging both to the national and to the international law. In a practical perspective, the importance of the approached theme lies in the broad scope of international bankruptcy issues, by which the competent authorities are invested.

*Keywords:* international bankruptcy, the debtor's center of main interests, the state of insolvency, reorganization and liquidation proceedings, insolvency law of the opening State, homogenization of the regulations, staying the creditors' rights, automatic recognition of judgments, enforcement of foreign decisions, coordination of the main proceedings with the secondary proceedings, cooperation between courts and foreign representatives.

## Chapter I. General considerations on bankruptcy

Bankruptcy is the state of manifestly inability to pay the outstanding debts, in relation to liquidity available to the debtor and which determine opening to it a collective, egalitarian and regulated proceedings, subject to supervision by a public authority. It was recognized in most legal systems that bankruptcy no longer fulfills the function exclusively sanctioning, but it is focusing on finding the appropriate solutions to save the status of debtor entities. Due to the expansion of economic exchanges, the cases where in the structure of a relation for bankruptcy are identified foreign elements are particularly common. International nature of bankruptcy is printed of the existence of one or more foreign elements, which are present in the collective procedure. The foreign element may consist in the location of the debtor's assets within different states, or when the debtor has establishments abroad, creditors, suppliers or employees settled abroad. This element brings together several legal systems, raising specific issues of private international law, among which the most important are those related to qualifications, determining the competent authority to administer the procedure, the applicable material law and especially the recognition and enforcement abroad of the effects of the declarative decision of bankruptcy. The reality of national character of bankruptcy legislation is opposed to the reality of the international character of a increasing number of bankruptcy proceedings, since trader`s geographical area of activity exceeds the national borders.

## Chapter II. International legal framework for bankruptcy

Since intensification of international trade involves an exponential increase in cross-border insolvency cases, the insufficiency of means offered by national legal

systems has become a serious problem. In this context, the need for an appropriate unified framework is more than obvious. At international level,authorities had sustained the negotiations designed to ensure uniform bankruptcy rules, which have materialized in conventions, treaties, model laws and other legal instruments. With the adoption of international legal instruments relating to cross-border insolvency matters, private international law legislation of the States has undergone some changes. The changes involved are different, as international instrument is mandatory oriented, assuming direct application, such as nr.1346/2000 EC Regulation on insolvency proceedings, or a guidance-oriented, requiring a separate implementation process by adopting a internal rules inspired by its contents, such as UNCITRAL model Law on cross-border insolvency 1997.

In Romania, in relation to non-European states are applicable the provisions of Law. 637/2002 on the regulation of private international law in the field of insolvency, which incorporates accurately the provisions of UNCITRAL Model Law on cross-border insolvency. Romania's relations with other European Union member states are solved by direct application of EC Regulation no. 1346/2000. In this study, we have examined the regulatory proposals elaborated by UNCITRAL on Bankruptcy,contained in the Legislative Guide on Insolvency Law, established in 2004. Drafting legislative guide was not made in the idea that such recommendations to be taken as such in national law, their role is rather to highlight the most important aspects of the matter, which should be reflected in national legislation providing also the guidelines under which each state may devise implementation rules.

## Chapter III. International jurisdiction on the opening of bankruptcy proceedings

In terms of doctrine, have outlined two fundamental concepts regarding international jurisdiction in bankruptcy. Being better motivated and proving its effectiveness, the concept of unity and universality was adopted in international regulations, but in a modified form, that of universality limited. According to EC Regulation no. 1346/2000, in disputes relating to insolvency of the debtors who have the center of major interests located on the territory of a European country, it is recognized as competet to opene and solve the main proceedings the court in whose district is located that center of main interests and a secondary proceeding for instances where there is another place of the debtor. The main procedure generates universal effects, and it may be applied wherever they are assets of the debtor, while secondary proceeding produce territorial effects, which are limited to the assets located in the territory of the opening state. It is required that the center of main interests should correspond to the real seat, understood as the place where the debtor conducts his usual interests and which can be verified by third parties.

In the vision of the UNCITRAL Model Law, after recognition of a foreign main proceeding, it can be initiated a local insolvency proceeding against the same debtor, under the state law which adopted the model law and only to the extent that the debtor has assets in that State. In this case, the effects of those proceedings shall be restricted to the assets of the debtor that are located on its territory and to other property of the the debtor which should be administered in that proceeding under the law of that State, to the extent necessary for the application of cooperation and coordination.

## Chapter IV. The applicable law in the international bankruptcy procedure

The relationship of international bankruptcy is a report of private law of a commercial nature with foreign elements and thus it is governed by international trade rules, which are mainly material rules, as well as by the rules of private international law, which consists mainly of conflicting rules.

To resolve conflicts of laws are used two methods, the method of conflict rules and the method of substantive rules. On the basis of establishing of a uniform conflict rule that assigns legislative competence to the material rule of the opening state, Lex fori concursus, it is also determined its scope. The rule thus determined shall regulate the main issues involved in dealing with cases of insolvency. Only by exception to this rule, it is accepted that the opening procedure will not affect the rights in rem over the assets of another state, provided ownership of assets situated abroad and recognizing opportunity of the creditor to claim set-off according to the law of the claim, when this is not possible under the law of the forum. Since lex fori concursus does not regulate all international insolvency issues, regarding the regulation of certain aspects, shall apply the provisions of other laws, which are also indicated by uniform conflict rules. *The need to harmonize the rules on insolvency has become prominent because the bankruptcy procedure, as a legal institution, is mandatorily circumscribed to the procedural rules of the forum, which excludes the applicability of foreign rules; only as an exception was allowed the application of foreign laws in resolving legal relations with a foreign element on insolvency.* From this perspective, we consider necessary a unification of qualifications of the relevant concepts that are used in the states legislation. In the research conducted we have shown the results of the Report prepared by *INSOL EUROPE* in April 2010, at the request of the Committee on Legal Affairs of the European Parliament, titled *Harmonization of Insolvency Law at EU Level*. The uniformization of the rules does not aim to achieve total homogeneity, the existence of differences in insolvency law is a postulate which cannot or should not be denied.

The relative inability of traditional mechanisms of normative technique, represented by the substantive approach, led to the identification of other ways to unify substantive international bankruptcy law, including the creation of a common law, *jus commune.* The homogenization of substantive international bankruptcy law can be achieved starting from a deeper form of coordination which would highlight the complementarity between the legal systems and the originality of current rules. Such an approach is based on the intellectual link between the international regulations, which are based on common principles and methods.

## Chapter V. The conditions of opening the international bankruptcy procedure

To allow an application to open insolvency proceedings, the competent authorities shall verify meeting predetermined conditions according to the rules of the forum law. According to the comparative analysis of the laws of insolvency, there is a tendency to extend the application of the procedure on a more comprehensive category of debtors, so as to ensure equal treatment.

Regarding the criteria for defining insolvency, the most commonly used are: that of general cessation of payments, characterized by inability to pay the outstanding debt

with the money available and that the insolvency, characterized by an unbalanced state of debtor's assets, as the asset value is exceeded by liabilities value. Persons to whom are unanimously recognized the vocation of initiate opening of the procedure are of course the debtor and creditors, with some differences in the burden of proof on meeting the requirements of law. Of particular practical importance for facilitating the burden of proof is to establish the presumption of insolvency of the debtor in case of default of debt after a certain period of maturity. To ensure successful completion of the procedure, it is essential to identify the most appropriate procedure in order to be the debtor subjected to, since general procedure allows reorganization or liquidation. Currently, preference shall be given to the first choice, the second one being provided in most laws as a subsidiary solution applicable only as "ultima ratio". In the simplified procedure bankruptcy procedure is applied directly and it involves winding up. Decision to initiate the procedure is usually taken by the court, as a result of verification on meeting the substantive requirements at issue, but there are situations where legislation provide legal procedure opens on the basis of a simple request submission.

## Chapter VI. Effects of opening the international bankruptcy procedure

Even in the context of the diversity of solutions expressed by legislative policy of the states, one can identify a number of common aspects in the effects of the opening of insolvency proceedings.

The rules regarding the assets subject to insolvency proceedings developed in different legislations are similar, since all of them include goods belonging to the debtor on the date of opening of insolvency proceedings and also those obtained during the procedure. Comparative analysis of national legislation reveals that most of them require a general stay of the rights of creditors to harness and enforce any existing warranty at the time of opening of insolvency proceedings and also of any legal proceedings against the debtor. There are still certain statutory provisions establishing some exceptions to the automatic stay. These differences in treatment are due to differences between the laws on secured transactions. In this issue, we believe that standardization of qualifications is crucial, since recognition of a security interest has profound territorial implications. Disposal or sale of goods is planned to be ruled as a going concern, or separately, by public auction or through private transactions. Where is decided withdrawal the debtor`s right to administration, is necessary to establish the the intensity of this measure, which may take severe forms, as total removal of the debtor from conducting his business, or attenuated ones, such is the situation in which it is allowed to continue its work, but under supervision of a competent authority (the representative judiciary, committee of creditors, the syndic). Right to offsetting is generally accepted in the liquidation proceedings and in composition, by most legal systems.

## Chapter VII. Recognition and enforcement of decisions in the international bankruptcy procedure

Recognition the effects of a decisions rendered abroad means admitting the effectiveness of foreign decisions by the court of another state, without restart judgment of that case. Effects of recognition varies as it is a main procedure or secondary

insolvency proceedings. In accordance with EC Regulation, the opening of a main proceedings will determine, without further formality performance, in any other state, producing the effects under the law of the opening State, unless a secondary proceedings it is opened in that State. Based on the extension model, recognition of the decision of opening a foreign main proceeding causes production, in the State of recognition, of the same effects as those provided by the law of the opening State. Recognition of decisions taken in secondary procedures does no longer determine producing the same effects as those taken in the state of origin, so that any limitation of rights of creditors, as stay of individual actions or claims, or as debt relief, can be opposite, in terms of assets located in another Member State, only to the creditors who have given their consent. In the vision of Model Law, it is necessary to make a formal verification of the legality of the decision of opening the insolvency procedure. The recognition of a foreign main proceeding establishes a rebuttable presumption of insolvency of the debtor, making possible opening of a secondary proceedings against him, without further need to prove the existence of insolvency. Recognition of a main foreign proceeding determines automatic stay of creditors' rights. In addition to the effects that occur automatically, recognition of a foreign proceeding, even a secondary one, allows setting, upon request, for interim measures with temporary execution, in order to protect the rights of the debtor or creditors. Enforcement in another state of foreign decisions in the field of insolvency is required when, due to insufficient assets of the debtor, the creditors did not satiated their claim which was recognized in the national proceedings. A formality required for enforcement is obtaining an authorization called exequatur.

Requirements of obtaining exequautur are set by Regulation no. 1346/2000, which states expressly and exhaustively the cases in which this can be refused. Procedure for obtaining exequautur is carried out according with Regulation EC no. 44/2001. At the request of the party concerned, together with supporting documents, the decision shall be declared enforceable without the need to consider the conditions relating to cases where recognition may be refused.

Accordingly, automatic recognition decision is accompanied by the award of direct execution effect. Recognition of an insolvency proceeding opened in another Member State, or enforcement of a judgment taken under such procedure, or directly related to it, will be refused, if recognition or enforcement would be manifestly contrary to the public order in private international law, in particular to the general principles and fundamental rights and freedoms, enshrined in the Constitution.

## Chapter VIII. Coordination of concurrent proceedings and cooperation between authorities in international bankruptcy

To ensure the effectiveness of the procedures conducted at international level, existing regulations have established the appropriate means for coordination of parallel proceedings, ongoing on the same debtor.

Regarding the relations between European states, Regulation no. 1346/2002 aims at organizing a chronological primacy for the main procedure by avoiding situations where opening of concurrent proceedings would be possible. Local procedures can thus be considered as parts of an integrated system of cross-border insolvency, which operates in the application of a conventional scheme of coordination: the main proceedings -

secondary procedure. Coordinating the main proceeding with the the secondary one is achieved through foreign representatives, which are bound by cooperation and information. When a foreign proceeding and a local insolvency proceeding, that was opened under the State law which adopted the Model Law, are taking place concurrently regarding the same debtor, the court shall take appropriate measures for their coordination.

Through these solutions, the coordination of procedures aims to maintain primacy of the local procedure over foreign proceedings, without however being set a rigid hierarchy between procedures. Controlled universalism, enshrined in most international documents, allow that territorial proceedings, whether secondary or independent, inducing substantive effects over insolvency, which attracts some drawbacks. To remedy these problems, the solution proposed in the literature to which we subscribed, is to adopt a new format of territorial procedures, called auxiliary of main insolvency proceedings, which limits its action on procedural issues. Cross-border insolvency cooperation is mainly focused on empowering courts and insolvency administrators from two or more countries to act effectively to achieve optimum results. Obligation of cooperation and information between European countries, involved in insolvency proceedings, is also imposed by Regulation no.1346/2002. Liquidators from the main and the secondary proceedings are required to cooperate and communicate to each other information,in the common goal of all creditors. EU Regulation establishes an important norm of substantive law, concerning the rights of the foreign creditors, whose habitual residence, domicile or head office is in another Member State, to register their claim in any proceedings. We appreciate it would have been useful that the Regulation would had established, at least in terms of information, a direct right for the benefit of creditors from outside the Community.

Ensuring an effective information is imperative in order to achieve a proper cooperation in international insolvency. It is noteworthy the start of a project initiated in 2006 within the European Union, establishing a European e-Justice portal where to publish all the decisions opening of insolvency proceedings handed down by Member States. We believe that it would be particularly useful to develop a network, for achieving a common database. Model Law contains provisions on how to achieve effective cooperation between the States concerned in cross-border insolvency proceedings. Involved authorities are required to assist each other, both when requested by a representative of a foreign proceeding to recognize his right of direct access to the ongoing local procedure, or to enable him to request the opening of such proceedings. The administrator or the liquidator acting under the state law which adopted law model is kept, in the exercise of its functions and subject to the supervision of the court, to cooperate to the maximum extent as possible with foreign courts or foreign representatives. Referred cooperation can be implemented by any suitable means. According to recent proposals made within UNCITRAL, coordinating of groups of companies could be achieved by the rules that are set out in Regulation EC about the relationship between the main proceedings and secondary insolvency proceedings in terms of how to meet the obligations of communicating information, or of the coordination conducted by the liquidator in the parent company on the subsidiaries procedures. Even in this context, we think it would be appropriate to supplement the

international legal framework with specific and detailed regulation of insolvency of groups of companies, which would limit the conflicts of jurisdiction.

## CONCLUSIONS

The issue presented in the conducted research highlights the importance of developing an efficient and permanently adapted legal framework, according to the reality of economic environment, that should govern, both domestic and international aspects of undertakings in financial difficulty. Achieving a coordination of rules regarding the conduct of cross-border bankruptcy can not be conceived without the compliance with printed features by the interests of the states involved in the case.

The legal framework on international bankruptcy has been contoured by the sustained efforts of state authorities and of international organizations, to elaborate a minimum of rules designed to reconcile the interests of various parties in attendance. Such a concerted demarche in the sense of internationalization of standards, it is quite difficult, especially because bankruptcy, being an enforcement proceeding, can not be detached from state coercion. The instruments elaborated are heterogeneous by formation, both in terms of their field of action, in the procedures that govern them and in the way that they are implemented. We believe that through its adoption in a broadest possible number of states, the Model Law would suffer a process of naturalization, which would ensure the right balance between respecting local regulations and setting up a unified framework governing bankruptcy. Overall, concerning the evolution of the international legal framework must recognize that any effort would make, and any progress would be made in regarding cooperation, a full unification in regulating the bankruptcy is hardly conceivable. In fact, this is not a goal to follow, given the importance of maintaining a certain degree of autonomy of the states, subject to compliance with the general principles of bankruptcy. We share the belief that homogenization of substantive international bankruptcy law can be achieved starting from a deeper form of coordination which would highlight the complementarity between the legal systems and the originality of concurrent rules.