INSOLVENCY - EVOLUTIONS AND PERSPECTIVES OF LEGISLATIVE REFORM AT NATIONAL, EUROPEAN AND INTERNATIONAL LEVEL

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Abstract

At the national level, we can really invoke the passage of a road to maturity of the insolvency legislation, especially the Law no. 85/2014, which was intended to be a legislative reform, with major impact in terms of increasing the percentage of the number of companies that have a second chance, on the one hand, but also on reducing the stigma of insolvency, on the other hand. We wonder if after 5 years of implementation this has been achieved, whether it is a problem of our culture or a problem of certain legislative gaps or administrative impediments. How can we maintain a balance between the culture of a state, which hardly changes over time, and an almost perfect institution, but at the same time difficult to implement? Why is the rate of successful reorganizations still low? When do we manage to have control of a modern insolvency legislation, if we slow down progress or return in time through a simple emergency ordinance, such as the one in 2018? How do we implement at national level the new European Directive, recently entered into force, which aims to develop a "rescue culture" for the insolvent debtor, a direction that at national level we have abandoned? How do we manage to evolve and thus fit into the perspectives for legislation evoked at international level, intensely promoted by UNCITRAL, or at least to maintain the appearance of legislation adapted to the new guidelines inevitably impregnated by globalization? It is interesting to analyze the essence of a critical question in the specialized literature[3]*: "Does the imperfection of the legislation generate mistrust or does mistrust generate imperfect results of almost perfect legislation?" It is ultimately a balanced harmonization between culture and legislation, between legislative and administrative, between aspirations and economic, political and social developments, between domestic law and international law, between rights and interests.*

Keywords: *insolvency, international perspective, European perspective, a new EU Directive, national legislative reform, INSOL Europe, INSOL International.*

JEL Classification: K22, K23, K33, K35

1. International perspective - new implementation guides in the field of insolvency developed under the aegis of UNCITRAL. SINGAPORE, AUSTRALIA and HONG KONG - some examples of good practices, cases and solutions in reconfiguring insolvency law through the INSOL International filter

Through a somewhat abrupt approach and considering an extension of the article published in March 2019 in the Legal Tribune[4], we are going to analyze and debate exclusively the aspects of legislative, jurisprudential and case law novelty, in the idea that we need an urgent view on the legislative future of insolvency law in the context of the latter predictions about the onset of a new global economic crisis with a much greater destabilization potential than the previous crisis.

We think it is advisable to evoke as a priority an international topical image on the field of insolvency, in the sense that we aim to narrow the scope of analysis during the research, at European level, respectively at national level, in order to identify and extract the best practices and solutions of law that can reform domestic customs and law.

The phenomenon of insolvency continues to enjoy intense concern in terms of international legislation[5], as UNCITRAL Working Group V (United Nations Commission on International Trade

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[3] Vasile Godîncă-Herlea, *Law no. 85/2014, a road to maturity*, „Phoenix Magazine" no. 65/2018 (July-September 2018), p. 20-24.

[4] Ionel Didea, Diana Maria Ilie, *(R)evolution of the insolvency law in a globalized economy*, „Juridical Tribune - Tribuna Juridică", vol 9, issue 1, 2019, pp. 91-112.

[5] For development on the legislative contribution in the field of insolvency in recent years at international and European level, see Ionel Didea and Diana Maria Ilie, *op.cit*., especially section *3. New Union and international "coordinates" in the outlining of the insolvency regime*, which may represent a preamble to the present study.

Law) has made tremendous progress at its 55th session in May 2019 in New York[6] ending the activity in *The draft Implementation Guide* of what is expected to become *the model of the UNCITRAL Law on the insolvency of the group of companies*. Both the draft law model and the draft guidance for implementation were sent to the UNCITRAL Commission for finalization and adoption in the next session. As a result, States will be invited to incorporate the Model Law into their national laws in order to "equip" them with modern legislation targeting internal and cross-border insolvency of the groups of companies. This model law as well as the *Model law on the recognition and enforcement of insolvency decisions* are designed to complement the 1997 UNCITRAL Model Law on Cross-Border Insolvency (MLCBI) and the UNCITRAL Legislative Guide on Insolvency Law, in particular the third part. The MLCBI-based legislation has been adopted by numerous jurisdictions, including some EU states: United Kingdom, Poland, Slovenia and Greece. At the same time, during this session the Working Group also discussed one *draft law on a simplified insolvency regime for micro-enterprises* and suggested informal inter-session consultations to progress with this project, which was also taken over by the European Commission in collaboration with Working Group V. This reality reflected worldwide becomes an additional reason to raise awareness about rescue, but also a basis for accepting the procedure of judicial reorganization as a priority and necessary measure in the current and prospective internal context, as global financial waves can even make it difficult for businesses in principle healthy.

Through the filter of *INSOL International* [7] we consider it appropriate to extract and refer to the latest tendencies to tackle insolvency from different cultural perspectives and external to the European Union, as well as *Singapore, Australia and Hong Kong,* identifying insolvency solutions and schemes that have experienced a rapid evolution and legislative reform and which can become examples of good practices at European and national level. INSOL International offers in real time an extremely varied range of articles targeting jurisdictions and regions around the world, which we can assemble in the context of global insolvency positioning related to the economy and culture of each state and region, being permanently connected to developments and the tendencies of legislative interpretation and reform, as well as of inter-state collaboration.

In fact, The International Insolvency Federation Insol launched in August 2019 the first "overseas office" in Singapore, The office - Insol International Asia Hub assuming the commitment to coordinate, promote and deepen the insolvency area at regional level, especially the development of restructuring systems[8], thus joining the more than 160 international organizations in Singapore, including the World Bank Group and Interpol, as well as 4,200 regional headquarters of multinationals. Despite trade tensions between the United States and China, the overall trend in the region remains a rising one, with Asia clearly aiming to achieve extraordinary growth over the next few decades, both in infrastructure development and in trade flows and business flows, and this will increase the need for restructuring. We note an awareness of the need to reform and develop the insolvency legislation and practice, especially the reorganization, so necessary and in accordance with the support and the rise of the market economy, Singapore's stated goal being to become the main Asian centre for debt restructuring and one of the leading centres around the world, alongside London and New York.

On the other hand, the USA is not far behind, with President Trump signing recently the

[6] https://www.insol-europe.org/news/details/%E2%80%8Binsol-europe-in-new-york-for-uncitral-working-group-v, the date when it was last accessed 25.10.2019.

[7] *INSOL International* is a worldwide federation of regional and national insolvency professional associations, currently having 44 member associations around the world and over 10,500 INSOL professional members - https://www.insol.org/ . However, *INSOL Europe* , as a member of the INSOL International Federation, plays a strategic role in regional and international research and cooperation in the field of insolvency, through a transparent exchange of information, ideas and experiences on best practices in the field, in collaboration with the World Bank and the OECD - https://www.insol-europe.org/.

[8] Law and Home Affairs Minister K. Shanmugam of Singapore - *International insolvency federation Insol launches first overseas office in Singapore* - https://www.straitstimes.com/singapore/courts-crime/international-insolvency-federation-insol-launches-first-overseas-office-in?xtor=CS3-18&utm_source=STiPhone&utm_medium=share&utm_term=2019-08-06%2019%3A08%3A16, consulted on 25.10.2019.

Small Business Reorganization Act[9], this reorganization law dedicated to small businesses will come into force on 22 February 2020. The new procedure will be regulated in subchapter V within chapter 11 of the United States Bankruptcy Code, offering small businesses with liabilities not exceeding $ 2,725,625 the opportunity to reorganize through a simplified procedure, which lasts between three and five years, supervised by a "permanent trustee" who coordinates the review of the company's financial status and business operations, reports any fraud, so as to ensure that the distributions are made in accordance with the reorganization plan to which the creditors have adhered. This project is an extremely beneficial accomplishment of the federal government and the American Bankruptcy Institute, representing a real remedy for the struggle of survival of small businesses in the increasingly vulnerable economic market, a measure proposed by the European Commission as well at EU level.

Returning to Singapore, which is indeed positioned as a hub for insolvency and restructuring and which has seen an increase in cross-border restructuring cases through the increasing complexity of insolvency cases, also imposing the use of alternative litigation processes, we mention that since 2017 the Companies Law has been modified to introduce improvements to the debt restructuring laws in Singapore, as the absolute priority status for financing in the reorganization procedure („*judicial management*") but also in the pre-insolvency proceedings („ *the scheme of arrangement*"). Regarding cross-border insolvency, the UNCITRAL Model Law on cross-border insolvency was adopted to facilitate cooperation in this area. In fact, in 2018 the High Court of Singapore issued a historic decision in the case *King Zetta Jet*[10] on the issue of "public policy" according to the UNCITRAL Model Law, adopted by Singapore in the tenth Annex to the Companies Law (the Singapore Model Law). This was the first reported decision in which the High Court examined the issue of public policy in a request for recognition of a foreign insolvency proceeding. In this case, the applicants sought recognition of the foreign insolvency proceeding initiated by Zetta Jet Pte Ltd (Zetta Jet Singapore) and its subsidiary Zetta Jet USA Inc (Zetta Jet USA) in the United States, as well as the US trustee appointed by the Bankruptcy Court in US (US trustee) in these proceedings, considering that according to US law at the time of admitting insolvency, a worldwide moratorium was imposed on all proceedings against Zetta entities. In the case, Asia Aviation Holdings Pte Ltd (AAH), a shareholder of Zetta Jet Singapore, invoked the exception to the violation of public policy, obtaining also a court order in Singapore. The public policy standard as regulated by Article 6 of the Singapore Model Law differs from the UNCITRAL Model Law, in that under the UNCITRAL Model Law a court can refuse recognition only if it is "manifestly contrary" to public order. The Singapore model law, however, omits the expression "clearly*"*. AAH has motivated the violation of public order by the fact that the top management of Zetta Jet Singapore, its employees, facilities, operations, businesses and creditors are all located in Singapore and it is necessary to apply domestic law in particular, and cannot be admitted as a US insolvency process in connection with Zetta Jet Singapore to be considered as such a foreign main proceeding under section 17(2) of the Singapore Model Law. To answer the first question that Zetta Jet Singapore (COMI) was the US and therefore the insolvency procedure in the US should be recognized as a foreign main proceeding under the Singapore Model Law, the Court analyzed the positions of the English, American and Australian courts, respectively: the English position - the date of the start of foreign insolvency proceedings; US position - the date on which the application for recognition was filed; Australian position - the date on which the application for recognition is heard, considering that the US position offers greater certainty and better agreement with the commercial realities and language of the provisions of the Singapore Model Law. The Court took into account many factors in its assessment of the core interests of Zetta Jet Singapore, namely: the

[9] Kyle Arendsen, *Small Business Reorganization Act Signed into Law - A New Frontier for Small Business Bankruptcies*, https://www.esquireglobalcrossings.com/2019/08/small-business-reorganization-act-signed-into-law-a-new-frontier-for-small-business-bankruptcies/, the date of last accessed 23/10/2019.

[10] Tan Meiyen, Thenuga Vijakumar, Dennis Oh, *A Review of Restructuring and Insolvency Cases Dealing with the May 2017 Amendments to the Singapore Companies Act*, available temporarily on INSOL International news - https://www.insol.org/ , the date of the last accessed for download 20/09/2019.

place from which the control and management was administered, the place of the customers, the place of the creditors, the place of the employees, the place of the operations, the relations with third parties and the applicable law, considering in this case that the most important factor was the location of the primary decision makers that the applicant registered in the USA. Accordingly, the court held that, in these circumstances, there was no reason to deny recognition on the basis of public policy, rejected the presumption that Zetta Jet Singapore's COMI was Singapore and recognized the US insolvency procedure as a foreign main proceeding, despite AAH's arguments regarding the US agent's breach of the Singapore order in the continuation of US bankruptcy proceedings and Singapore public policy, an order otherwise cancelled later. It should be noted that the foreign representative may file a claim with the Singapore courts for recognition of the foreign restructuring or insolvency procedure, if the main proceeding takes place in the state where the debtor has its COMI. However, such procedures cannot be recognized in Singapore if they are found to be contrary to public policy, although the courts have shown the willingness to grant limited recognition in such cases, under fair conditions.

Also, in 2018, the High Court approved the first pre-insolvency procedure *(the scheme of arrangement)* in accordance with Section 211 of the Companies Law, which allows the courts to approve a predetermined scheme without having to organize a meeting of the creditors of the preventive reorganization plan. This type of plan was proposed by *Hoe Leong Corporation Ltd*, [11] a company listed on the Singapore Stock Exchange to deal with secured and unsecured creditors. The court approved the scheme shortly after two months from the date of dispatch of the documents, the quick pace of settlement accompanied by the removal of the costs of a court hearing to request the approval of the preventive reorganization plan for the convening of a creditors meeting clearly offers considerable time and cost savings for companies in difficulty and is likely to become the preferred option in Singapore. This measure is intended to become more and more concrete at European level, in the sense of foundation also at a practical level, not only theoretically, given the newly entered into force Directive that we will develop in the next section.

At the same time, also interesting is the case *China Sports International Limited [12]*, this becoming the first foreign company that was allowed to use the regime of judicial reorganization („*judicial management*") from Singapore. China Sports International Limited was registered in Bermuda, but carried out operations in China, producing clothing and footwear under the brand name Yeli Sports. Most of the company's assets were in Hong Kong and China, but it was listed on the Singapore Stock Exchange, with the 2017 amendments to the Companies Act allowing a foreign company with a substantial connection with Singapore to be placed under "judicial management" in Singapore, the courts considering several factors for determining a "substantial connection" according to the law, but not limited to: the company operates in Singapore or is headquartered in Singapore, the company that has substantial assets in Singapore, the company which is subject to the jurisdiction of the courts of Singapore for the settlement of one or more disputes relating to a loan or other transaction. In the case of China Sports International Limited, listing on the Singapore Stock Exchange and the fact that it was subject to financial reporting requirements, accounting standards and auditing under the Companies Act were factors that established Singapore as the company's COMI and therefore its substantial connection with Singapore. As a side note, we return to the USA and consider it appropriate to point out that the New York Southern District Court has recently issued a new interpretation and jurisprudential update to Chapter 15 of the US Bankruptcy Code, ruling in August 2019 in the case *Ascot Fund Ltd*. ("The Ascot Fund")[13] that an investment

[11] Hoe Leong Corporation Ltd., Announcement, *Other Scheme of Arrangement - Proposed Scheme of Arrangement*, 17-Nov-2017, 9 January 2019, http://infopub.sgx.com/FileOpen/HLC%20- %20Scheme%20of%20Arrangement.ashx?App=Announcement&FileID =479089, *apud* Tan Meiyen, Thenuga Vijakumar, Dennis Oh, *op.cit*., https://www.insol.org/ .

[12] The Business Times, *Deloitte & Touche appointed interim judicial managers for China Sports International*, https://www.business times.com.sg/companies-markets/deloitte-touche-appointed-interim-judicialmanagers-for-china-sports-international, *apud* Tan Meiyen, Thenuga Vijakumar, Dennis Oh, op.cit., https://www.insol.org/ .

[13] Debtor Ascot Fund Ltd. ("Ascot Fund") is an investment fund organized in accordance with the Cayman Islands law. For the most part, all of its assets have been invested in Asset Partners LP ("Asset Partners"), a limited liability partnership in Delaware. For a foreign proceeding to be recognized under the US Bankruptcy Code, it must be a "main foreign proceeding". The Ascot Fund called

fund organized under the Cayman Islands law and involved in a liquidation procedure there, has its COMI in Cayman Islands and not in New York.

The year 2019 marks the field of restructuring and insolvency in Singapore, given the long awaited Law on insolvency, restructuring and dissolution - *IRDA*, adopted in the Parliament in October 2018 and entered into force in 2019, an act that consolidates the laws on personal and corporate insolvency, connecting in a single legislative body both the restructuring of the debts of individuals and companies. Singapore is becoming an example of multilateralism, international collaboration and the rule of law in a world of evolution, responding to the challenges of globalization and expanding opportunities for transition. Singapore has recently opened new horizons for the operation of international trade by promoting and hosting the Convention on mediation between 6-7 August 2019, [14] which contributes to the development of a mature, global, rule-based trading system, by facilitating international trade and promoting the use of mediation for the settlement of cross-border trade disputes. The Singapore Convention on Mediation, officially known as the United Nations Convention on International Settlement Agreements resulting from Mediation, was adopted by the UN General Assembly in December 2018 with a view to facilitating international exchanges and trade, allowing the parties to the dispute to easily apply and invoke the settlement of foreign agreements. Similar to the Convention on the Recognition and Adoption of Foreign Arbitration Decisions (New York Convention, 1958), the Singapore Convention provides a uniform and effective framework for the application of international settlement agreements resulting from mediation, which becomes binding and enforceable under a simplified and standardized procedure. The Singapore Convention should in time become an important element of the rule of law that underpins the functioning of international trade.[15]

Imminent changes in Singapore's legislative landscape suggest that mediation will soon become one of the tools available for insolvency and restructuring practitioners. Similarly, there is availability for the use of arbitration in certain types of litigation, which will assist in insolvency and restructuring issues and help them solve them faster. In the decision *Re IM Skaugen SE [16]* the court emphasized that facilitating discussions in a cooperative, transparent and collaborative environment, where all stakeholders work towards a common goal of achieving effective and sustainable restructuring, could lead to better results than a typical adversarial trial. The judge also stated that the mediator will play the invaluable role of building consensus and trust between the debtor and the creditors, so that the differences would be easier to reach in the elaboration of the restructuring plan, which is why the use of mediation in cases of insolvency and restructuring takes shape in Singapore.[17] Moreover, as more states sign the Singapore Convention, the mediation

for the recognition of the Cayman procedure as "a main foreign proceeding, which is why it was required to show that its center of main interest - COMI is in Cayman, not New York. According to article 1516 (c) of the US Bankruptcy Code, it is assumed that the place of the debtor's premises, in this case Cayman Islands, confirms COMI. "COMI is where the debtor carries out its usual business, so that the place can be verified by third parties". The court noted that both before and after the liquidation process, the Ascot Fund was managed from the Cayman Islands, its pre-liquidation council being set up there, and the current common liquidators actively managing the business from an office there. The Court also discussed the governing law and the expectations of creditors, noting that the Ascot Fund has consistently presented itself as a Cayman Islands company with shareholder agreements and shareholder subscription agreements governed by Cayman law. While Delaware or New York law might regulate the distribution from Ascot Partners to the Ascot Fund, the distributions from Ascot Fund are strictly regulated by Cayman law, with the shareholders being located in a number of different locations. See Jonah Wacholder and Daniel A. Lowenthal, *New York Bankruptcy Court Issues Ruling on Recognition of Foreign Proceedings*, on August 22, 2019 - https://www.pbwt.com/bankruptcy-update-blog/new-york-bankruptcy-court-issues-ruling-on-recognition-of-foreign-proceedings/, the date when it was last accessed 23/10/2019.

[14] https://www.singaporeconvention.org/, consulted on 25.10.2019.

[15] Sreenivasan Narayanan SC and Wei Liang Jason Lim, *The Singapore Convention on Mediation: A Primer*, July 25, 2019, Practice Group: Complex Commercial Litigation and Disputes, https://www.insol.org/ , available temporarily on INSOL International news - https://www.insol.org/ , the date of the last accessed download 20/09/2019. Following Papua New Guinea's confirmation of its intention to ratify the New York Convention, 60 years after its entry into force, the New York Convention now has 160 signatory parties. Similar to the New York Convention and other Conventions comprising the international dispute resolution framework, the success of the Singapore Convention will depend on a critical mass of states choosing to sign and ratify it.

[16] Re IM Skaugen SE [2019] 3 SLR 979 at [94]. A se vedea Tan Meiyen, Thenuga Vijakumar, Dennis Oh, *Alternative dispute resolution in insolvency and restructuring proceedings,* 12 July 2019, https://www.internationallawoffice.com/Newsletters/Insolvency-Restructuring/Singapore/Oon-Bazul-LLP/Alternative-dispute-resolution-in-insolvency-and-restructuring-proceedings, the date of last accessed 23.10.2019.

[17] The International Insolvency Institute, an international organization dedicated to intensifying coordination in international

solutions made in the context of insolvency will also be increasingly enforceable, making it more attractive as an alternative to litigation.

Unlike mediation, the arbitration requires the assessment of the merits of each party's case before reaching a decision that binds both parties. The Singapore Consolidation Committee as an International Centre for Debt Restructuring has suggested that arbitration can be used effectively in pre-insolvency and post-insolvency litigation, becoming extremely useful in litigation involving cross-border issues as it prevents litigation in various jurisdictions.[18] One of the main advantages of choosing arbitration against litigation in insolvency proceedings is the greater international applicability, as arbitration decisions [19] can be applied under the New York Convention in more than 150 states, while only 46 states have adopted UNCITRAL's Model Law on Cross-Border Insolvency, and greater applicability promotes greater certainty for claimants in pre- and post-insolvency litigation. At the same time, it implies confidentiality and greater autonomy of the parties in the process of dispute resolution, as well as in selecting an arbitrator who can be an expert in their field.

Other important issues include a recent case in the case *Halifax Investment Services Pty Ltd* on the decision of the Federal Court of *Australia* [20] who considered that a request could be made to the High Court of New Zealand for a joint hearing in respect of requests for the accumulation of different funds held by Australian and New Zealand liquidation companies. If such a request is made, this will be the first coordination between the courts in Australia and New Zealand. The decision of the Federal Court of Australia in this case showed that it is willing to facilitate cross-border coordination of insolvent corporate groups. The cooperation between the courts from different international jurisdictions is materialized as a welcome option for insolvency practitioners to achieve a more efficient insolvency plan of insolvent corporate groups, even where the UNCITRAL model law is inapplicable.

Also the decision *Singularis Holdings Ltd v PricewaterhouseCoopers* (*Singularis*)[21] was a welcome evolution in the cross-border insolvency insofar as it revived the principle of universalism, which suffered a setback in the case *Rubin v Eurofinance SA* before the Supreme Court of the United Kingdom. An essential practical aspect identified by the case *Singularis* it was to establish the limits of the liquidators' capability to obtain foreign assistance. For many offshore liquidations, this can be a significant obstacle to successful liquidator investigations. The decision has a wider significance for the offshore world, because the problem it has determined has been in relation to those British colonies, annexed territories and overseas territories, such as Bermuda and the Isle of Man, which do not have their own statutory powers to assist foreign officials in insolvency proceedings. *Hong Kong* it is such a jurisdiction where the power to assist foreign courts is limited to common law. The Court of First Instance of the Hong Kong Special Administrative Region (Hong Kong Company Court) applied the judgment in *Singularis* on several occasions, to determine what assistance the court may offer to companies in Hong Kong subject to foreign liquidation,

bankruptcy law, has formed a Committee for the Alternative Settlement of International Litigation to promote the use of mediation and other alternative forms of insolvency settlement. In 2014, the European Commission also issued a recommendation to increase the use of mediation in insolvency proceedings. Also, INSOL International set up the Mediation College, which offers a group of mediators specialized in international insolvency. At the same time, the Singapore Mediation Center has already identified mediators dealing with mediation and insolvency and restructuring issues and has formed an Insolvency Commission to assist the parties involved.

[18] Committee to Strengthen Singapore as an International Centre for Debt Restructuring, Ministry of Law, Report *of the Committee* (20 April 2016), *apud* Tan Meiyen, Thenuga Vijakumar, Dennis Oh, *op.cit.*

[19] *New York Arbitration Convention*, "Contracting States – List of Contracting States" New York Arbitration Convention, *apud* Tan Meiyen, Thenuga Vijakumar, Dennis Oh, *op.cit.*

[20] Jason Opperman, Katherine Smith and Catherine Crawford, *Cross-border cooperation: Federal Court of Australia considers "classic candidate" for coordination with High Court of New Zealand*, 27 August 2019, https://i.emlfiles4.com/cmpdoc/8/7/4/8/2/2/files/7931_kl-gates-article.pdf, the date of last accessed 23.10.2019.

[21] Noel McCoy, Partner, Norton Rose Fulbright Australia, *The Singularis work-around? Overcoming limitations to the common law power of assistance for foreign insolvency investigations*, July 2019, articol disponibil temporar pe ştirile INSOL International - https://www.insol.org/ , the date of the last accessed download 20.09.2019.

considering the fact that these applications are becoming more and more common and complex.[22] *Singularis* has targeted an appeal by the liquidators of Cayman Island of Singularis Holdings Limited, who requested the presentation of documents belonging to the auditors of the company in Bermuda. The question asked in *Singularis* was whether the Bermuda courts had the power to apply legal provisions applicable to a Bermuda settlement and provided for the provision of information and documents to the liquidator, in support of a Cayman settlement. The application procedures can be costly and time-consuming, hence the question: is there a cheaper, faster alternative mechanism through which the court can facilitate investigations? Thus, the alternative solution identified by the court involved obtaining the recognition of the insolvency process that takes place at the place of establishment of the company in a jurisdiction that adopted the UNCITRAL Model Law, such as Australia, which would allow the liquidator to overcome the limitations of the statutory powers in the jurisdiction of origin and to oblige third parties to submit documents. It turns out that if an exemption is granted under the Model Law to grant the foreign representative all the powers of a local Australian liquidator, the foreign procedure would have the powers to collect the information described above. The attribution of such powers to a liquidation procedure in the Cayman Islands, at least within the territorial reach of the Australian Corporation law and courts, would exceed the limitations of the Cayman Islands law in requiring third parties to submit documents. In this context, the likelihood that the Hong Kong Business Court will adhere to a request from an Australian court would be closely linked to the extent of the power of mutual assistance. Therefore, the court noted that the easiest way to obtain assistance in a foreign liquidation from the Hong Kong Company Court is through a letter of request addressed directly to it, avoiding the impact of a liquidation order in Hong Kong, as well as the employment of its entire insolvency regime. Consequently, the latest changes to The Companies Ordinance (winding up and various provisions, Chapter 32) extend the jurisdiction of the Hong Kong Business Court, which now has the power to order the submission of documents from third parties that refer to "promotion, training, trade, business relations, business or company property". However, the "*forum shopping*" problem could appear in a more extreme example where liquidators are seeking recognition in Australia for the sole purpose of pursuing submission of documents in a jurisdiction such as Hong Kong, under the umbrella of the Model Law's extended powers.

2. New challenges at European Union level. Harmonization and implementation of the Directive (EU) 2019/1023 on preventing restructuring frameworks. The negative impact of BREXIT on the harmonization framework and on cross-border restructuring

The normative context of insolvency continues to go through many major changes at European level. If we access the INSOL Europe website[23] and we check the latest news that connects us in real time to the stage and dynamics of the field of insolvency, we can see that the topic of the most recent conferences revolves around the way of harmonizing the national laws with the new Directive of the European Union, a key point being the serious issue of Brexit that can negatively influence cross-border restructuring, as well as the framework of European and international harmonization. Moreover, at the end of June 2019, the 8th European Insolvency and Restructuring Congress was held, with the new Directive surely to be debated, on which an exploration of the way of implementation at Pan-European level is to begin. It is worrying that, according to EU Commissioner Vera Jourova, the text is a unique achievement, with full harmonization unlikely, and a coordinated European approach becomes absolutely necessary in the face of aggressive American and Chinese market behaviour. In this regard, attention was also drawn to UNCITRAL's activity in the field of conflict of laws, with the recommendation of Member States to adopt the Model Law.

In the current uncertain context of the UK, Andrew Shore (UK Insolvency Service)

[22] Justice Jonathan Harris, *Understanding Cross-Border Insolvency in the Hong Kong Context*, „Hong Kong Law Journal" no. 55, 2017, p. 47, *apud* Noel McCoy, Partner, Norton Rose Fulbright Australia, *op.cit*.

[23] https://www.insol-europe.org/news/listing-details/72 , the date of the last accessed 24/10/2019.

presented at the BREXIT workshop[24] some of the challenges that the country faces, with priority the changes indicated in the national law. The key issue of the government remains the choice of the most balanced way to continue to promote business saving and employment, while reducing the risk related to the efficiency of cross-border courts and the impact on industry in the absence of a framework for cross-border restructuring with Europe. Following the withdrawal of the United Kingdom from the EU, the current Regulation 2015/84 (EIR), which refers to a system of jurisdiction and automatic recognition of insolvency proceedings opened in other Member States, will no longer apply to the relationship between the United Kingdom and the EU States, it is becoming a third country compared to European legislative instruments dealing with community issues. To give an example, article 20 paragraph (1) of EIR which provides that the main action opened in a Member State will have the same effects in any other Member State as in the State opening the proceedings, without other formalities, becomes an external measure that cannot provide a framework for solving insolvency problems in the case in which the proceedings are opened outside the European Union, implicitly in the United Kingdom. Therefore, insolvency proceedings opened in the United Kingdom after withdrawal will not be recognized in the Member States in accordance with the provisions of the EIR. We consider it desirable that, in cases where the debtor's center of main interests (COMI) is in the United Kingdom, insolvency proceedings opened in this state should be recognized and facilitated within the European Union and vice versa, as this is in the interest of international trade. However, business relations, including corporate relations between the Member States and the United Kingdom, will continue to be as strong in the future, and therefore insolvency issues between both jurisdictions will be as relevant as before. We take into account, even more, the conclusions adopted by the Extraordinary European Council of 17 October 2019 on Brexit, the European Council approving the *Political statement establishing the framework for future relations between the European Union and the United Kingdom of Great Britain and Northern Ireland* and reaffirming the Union's decision to have a partnership as close as possible with the United Kingdom in the future, in line with the political statement.[25]

INSOL Europe specialists [26] so far they have identified two ways in which recognition and assistance can be granted throughout the EU, in the context of Brexit. The two possible instruments of the EU are either a bilateral treaty between the United Kingdom and the European Union, or a legal instrument adopted by the European Union that provides for the recognition and facilitation of insolvency proceedings opened in third countries (including the United Kingdom), such as the UNCITRAL model - Law on cross-border insolvency. Indeed, the great advantage of adopting and uniformly integrating the Pan-European model of UNCITRAL would be that it would require the recognition of insolvency proceedings from third countries with the same rules throughout the European Union, which may inevitably be seen in the context of globalization and the promotion of the principle of universalism. Completion of the procedure in an orderly manner and the adoption in the British and European Parliament of an EU-UK agreement would simplify the alternative mechanisms and instruments for further economic, political and social cooperation and would stabilize the uncertainty triggered on all plans already becoming irreversible through major economic turbulence, political instability and insecurity.[27] Indeed, the IMF[28] warns that the pace of

[24] *Idem*.

[25] At the extraordinary meeting of the European Council (Article 50) on 17 October 2019, the European Council approved the *Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*. On this basis, the European Council invited the Commission, the European Parliament and the Council to take the necessary measures to ensure that the agreement can enter into force on 1 November 2019, so that an orderly withdrawal is provided, https://www.consilium.europa.eu/media/41107/17-10-euco-art50-conclusions-ro.pdf, the date of last accessed 22/10/2019. The new protocol will enter into force immediately after the end of the post-Brexit transition period, agreed to end in December 2020, but which may be extended by mutual agreement between London and Brussels for 1-2 years, https://www.bursa.ro/brexit-un-nou-inceput-in-sfarsit-25591831.

[26] B*ankruptcy After Brexit Recognition Of Insolvency Proceedings Involving The Uk Insol Europe's View* - https://www.insol-europe.org/download/documents/1307, consulted on 22.10.2019.

[27] In the Washington IMF annual meeting, UBS President Axel Weber, the largest bank in Switzerland, said that a "strike" is underway at the moment for investors, which could expand due to confusion and uncertainty over the exit of Great Britain from the European Union: *I think you have noticed, due to Brexit, but also to trade conflicts, that there has been a huge increase in uncertainties. Uncertainties have always been bad for investors. But what we see now, and we observe it in our customer base, is*

economic activity is increasingly slowed down due to commercial and geopolitical tensions that have caused a wave of uncertainties and eroded the confidence of business people in making investments.

Related to the latest news, perspectives and debates in the field of insolvency at European level, we mention the International Restructuring Conference R3 and INSOL Europe, which took place in London on 11 July 2019, a conference that has turned into a magnet for European professionals of cross-border restructuring. Thus, over 70 delegates participated with enthusiasm, contributing with opinions from several jurisdictions, including the UK, the Netherlands, Ireland, Germany, Austria, Switzerland, France and Portugal. In the conference with the theme "*Cross-border restructuring: at the crossroads in the wake of Brexit*?" the development of an international trade court approved by Ireland, the Netherlands, France and Germany was also debated.

A novelty and an opportunity to take advantage of the chance of harmonization in the sense of a culture of salvation through a legislative reform of the insolvency institution is the entry into force of the Directive (EU) *2019/1023 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency).*[29] Thus, on 6 June 2019, the European Council officially adopted the Directive on preventive restructuring frameworks, the formal vote of the European Council marking the end of the legislative procedure after the proposal for a directive was adopted by the European Commission since 2016.[30] The Directive on preventive restructuring frameworks offers a high degree of flexibility to Member States to adapt the new legislation to their existing regulatory frameworks. The aim of the Directive is to harmonize the laws and procedures of EU Member States on preventive restructuring, insolvency and discharge of debt. Outside the banking and insurance sectors, EU insolvency law has so far focused on regulating cross-border insolvency proceedings and has addressed, in particular, issues relating to the jurisdiction of courts, recognition of the effects of proceedings in other Member States and conflicts of law. The Directive represents the first major step in the process of harmonizing the various European insolvency laws, with three main objectives: enterprises in each Member State should have access to a preventive restructuring framework that allows them to avoid insolvency and continue to operate, insolvent or over-indebted entrepreneurs should benefit from a complete discharge of debt within a reasonable period of time, the efficiency of procedures involving debt restructuring, insolvency and discharge should be improved. One of the elements that seem to be underlined at the European Union level is the encouragement of extrajudicial agreements, those *out-of-court* transactions, thus going on the attempt of restructuring outside the court and before pronouncing the fateful word "insolvency". These transactions represent attempts to stabilize the claims and restructure the activity by massively inviting negotiators of the creditors who hold the majority of claims, those of control.

Interesting concepts are also introduced at the level of financing, financing that is considered necessary for reorganization, interesting being that in addition to the classical financing that intervenes after the opening of the procedure, there is introduced the "intermediary financing" which should be outlined before it is reached in a proceeding before the syndic judge. At the same time, the Directive emphasizes the concept of *"independent business review*" (IBR), which encourages the analysis of a restructuring plan by an expert external to the insolvency procedure, in

almost an investor strike" quoted by CNBC - http://www.ziare.com/brexit/economie/presedintele-ubs-avertizeaza-brexitul-poate-provoca-o-greva-pe-scara-larga-a-investitorilor-1582314, consulted on 22.10.2019.

[28] IMF spokesperson Gerry Rice appreciated that "*trade tensions are beginning to affect a global economy that is already facing difficulties, including a weakening of industrial production that has not been recorded since the global financial crisis of 2007-2008*" https://www.capital.ro/se-apropie-o-noua-criza-mondiala-avertisment-dur-al-specialistilor-in-economie.html, consulted on 22.10. 2019.

[29] The text of the Directive can be consulted by accessing the website: https://eur-lex.europa.eu/legal-content/RO/TXT/PDF/?uri=CELEX:32019L1023&from=EN, consulted on 22.10.2019.

[30] The new EU Directive on preventive restructuring frameworks was published in the *Official Journal of the European Union* on 26 June 2019 and entered into force on 16 July 2019.

the idea that he must perform an objective analysis through the "viability test" that is introduced for the debtor. It is in fact a model of analysis that all bank lenders used when they gave their consent regarding restructuring proposals, most of the time outside the court. This mechanism of the IBR will come to give consistency to the restructuring process, in the idea of objectifying it in a balanced way.

We consider that the key factor behind the Directive is the substantiation of a *culture of rescue*, strongly promoted lately at the European Commission level, the Directive also requiring Member States to ensure that insolvent entrepreneurs have access to at least one procedure that could lead to a complete discharge of debt and the period after which insolvent entrepreneurs must be fully discharged from their debts will not exceed three years. The Directive allows the national legislator to provide that the contractor is obliged to comply with certain obligations before obtaining any discharge of debt, such as, for example, a partial repayment of the debt. At the same time, it is specified that any decay that would prevent contractors from having access to or carrying on a commerce, business, trade or profession solely on the grounds that they are insolvent, established in accordance with national law, must be repealed when the entrepreneurs have obtained the discharge of debt, as this would not serve the purpose of the Directive to allow entrepreneurs a second chance. Access to discharge of debt will be denied or restricted only when the contractor has acted dishonestly or in bad faith in relation to the parties concerned. Similarly, Member States may exclude certain categories of debt from discharge, such as secured debts or debts resulting from criminal penalties or criminal liability.

Finally, the Directive recognizes that entrepreneurs would not actually benefit from the second chance if they had to go through separate procedures with different access conditions to discharge their professional debt and any personal debt incurred outside their profession. Therefore, Member States must ensure that, in cases where the professional debts of the contractors cannot reasonably be separated from the personal debts, both categories of debt will be discharged in the same procedure. Where these categories of debt can be separated, Member States may provide that they are discharged in the same or separate but coordinated procedures. We consider that these provisions do nothing but strengthen the idea of unifying insolvency legislation into a common corpus, which would represent a real Insolvency Code. *De lege ferenda*, we have in perspective, why not, a resizing of this so-called code, by outlining a much more complex Insolvency Code, which absorbs the legislative news, such as Law no. 151/2015 regarding the insolvency of the natural persons, respectively the insolvency of the administrative-territorial units, regulated by the Government Emergency Ordinance no. 46/2013 and approved by Law no. 35/2016, regulations that can be approached in analogy with the current Insolvency Code, while also developing the principles and practices based at the European Union level and worldwide.[31]

3. Perspective at national level - several problematic issues facing the current economic environment. New opportunities for legislative reform in the field of insolvency

The latest studies published in August 2019 regarding the evolution of insolvencies in Romania during the first semester of the year show a decrease of the number of insolvent companies by 33% in the context of a real economic growth sustained by 5.1%. The concern is that the macroeconomic evolution is not sustainable, with imbalances such as: „the deepening of the fiscal deficit by 81% in the first semester of this year, compared to the same period of the previous year, the highest annual inflation in the EU, of 4,1%, the increase of the trade deficit and the depreciation of the national currency."[32] However, the decrease of the insolvencies is cancelled by the significant increase of the number of cancelled companies (+76%), the number of companies

[31] See I. Didea, D.-M. Ilie, *Un nou statut al instituției insolvenței raportat la viziunea monistă promovată de Noul Cod Civil. Conturarea unui drept special, particular - dreptul insolvenței - urmare abrogării Codului Comercial*, „Curierul Judiciar" no. 8/2017, pp. 425-434.

[32] http://www.coface.ro/Stiri-Publicatii/Stiri/Studiu-Coface-Insolventele-in-Romania-in-scadere-cu-33-la-S1-2019-fata-de-aceeasi-perioada-a-anului-precedent, the date of last accessed 21/10/2019.

that interrupted their activity in the first semester of the current year being 85,960 companies, increasing by 36% over the same period of the previous year, and if we invoke the anticipated risks for the future, we refer to the certain idea that the business environment remains highly polarized, the first 1,000 companies, according to the turnover, concentrating half of the revenues of all 500,000 active companies in Romania.[33] Thus, according to the preliminary data published by the Insolvency Procedures Report, in the first semester of 2019, 3,058 new insolvency proceedings were opened, decreasing by 33% as compared to the same period of the previous year, when 4,562 insolvencies were opened. At the same time, with regard to the number of large companies, with turnover over EUR 0.5 mil, which went into insolvency during the analyzed period, it was registered a decrease by almost 40%, reaching 174 insolvent companies and thus reaching the minimum level of the last decade. The weaknesses in all this context that seems favourable are given by the difficult aspects that these companies face and which reflect the present economic and prospective reality in the sense that the investments decrease, the duration of the stock rotation increases, the speed of debt collection remains at a level quickly, and the profits are reinvested to reduce the degree of debt. Perhaps these worrying statistics should trigger a question mark over the future of the national economy and not only.

Although at national level the insolvency law seemed to revolutionize the legislation in the field, being strongly evoked for example at European Union level in the sense of model law regarding the incorporation of modern principles and mechanisms that bring at the centre of interest the debtor in financial difficulty and prioritizing the second chance principle, legislative changes often take us by surprise. This is because the national insolvency regime is "shaken" in 2018 by the entry into force of the Emergency Ordinance no. 88/2018 for amending and supplementing certain normative acts in the field of insolvency and other normative acts[34]. Although most of the doctrine envisaged that this ordinance will be declared unconstitutional in the shortest time, it seems that the only ways and levers of legislative balancing and the defeat of administrative and fiscal interests,[35] such as those of the budgetary creditor, remain the case law, doctrinal opinions and insolvency practitioners who are outlined in an attempt to identify viable solutions for interpretation, legislative correlation and harmonization with the will of the European legislator and with the principles that have enshrined and revolutionized the insolvency institution. We mention that the law approving this ordinance imposed last year by the Ministry of Finance is currently being debated in the Chamber of Deputies, UNPIR (National Union of Insolvency Practitioners) succeeding in promoting several amendments that ameliorate the negative effects of this normative act and modelling it as efficient as possible for good insolvency practice.[36] Despite the efforts of the courts that tried throughout this period in which it produced the effects of GEO no. 88/2018 to censure the parallel forced execution procedures, considering that the fundamental principles of the insolvency process are violated, such as the insolvency, collective character and the impossibility of unavailing the single account for reasons related to the essence of the insolvency procedure, the ANAF insists

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[33] "*After a decade in which about one million companies interrupted their activity, of which almost 150,000 insolvents, the phenomenon of insolvencies decreases to historical lows. Thus, the number of insolvent companies in the first half of this year decreased by 33% compared to the same period of the previous year and by almost -40% on the segment of large companies, thus causing the smallest financial losses (surplus of debts over the level of fixed assets) or socially (number of jobs) in the last decade. Despite this fact, the business environment shows weakness, as the number of companies that interrupted their activity in the first semester of the current year increased by 36% compared to the same period of the previous year, while the value of the instruments refused to pay it tripled* ", statement of Mr. Iancu Guda, Services Director Coface Romania.

[34] Published in the Official Gazette of Romania no. 840/02 October 2018.

[35] The legislator has "collapsed" the entire legislative construction of the last years that emphasized a "culture of rescue" considering amending art. 5 paragraph (1), pt. 72, which adds a new condition for opening the procedure: *When the request to open the insolvency procedure is submitted by the debtor, the amount of the budget receivables must be less than 50% of the declared total of the debtor's debts"* and which obviously leads to the direct entry into bankruptcy of an even greater number of debtors in financial difficulty. At the same time, the Ordinance affects fundamental principles such as the insolvency and the unity, by allowing the forced execution of the current debts in the procedure, being unbalanced to a great extent the reorganization process, however in a very small percentage of 5-6%, and coming in contradiction with the international practices in the matter that recommend the avoidance of forced executions. Under the new regulations, art. 143(1) of Law no 85/2014 it's changing, being completed as follows: *„ ... For debts accumulated during the insolvency proceedings that are more than 60 days old, the forced execution can be started".*

[36] See Nic Bălan - President of UNPIR, in *Cuvântul preşedintelui*, „Phoenix magazine" no. 68/2019, p. 3, 4.

on evoking of their own interest, by proposing to allow the single account to be opened, in accordance with art. 143 par. (1) and (3) of the amended insolvency law, submitting in this respect also amendments to the law approving GEO no. 88/2018, not yet materialized at the legislative level. Basically, at the internal level, the settlement measures are dragging on and all that is being pursued is the creation of a superiority of the budgetary receivables, if any, in relation to all the other creditors. The direction is certainly not a good one, although we have been accustomed to saying lately that we are enjoying a law of modern insolvency, which unfortunately has taken a new turn, right from the moment when through a parallel legislative change, respectively the Fiscal Procedure Code, has been taken out of the competence of the trade union judge to resolve the appeals to the tax claims, thus casting in uncertainty the fate of any debtor who has significant debts to the state budget, by the objective impossibility of solving that one appeals within a reasonable time to be filed on the speed of the insolvency proceedings.

The worrying reality facing the economic environment, on the one hand, and the courts, as well as the insolvency practitioners, on the other hand, as a result of this ordinance, is represented by the very large wave of forced executions initiated by ANAF pursuant to art. 143, being realized a true avalanche of garnishments of the single account and creating great syncope in the activity of the insolvent debtors. However, the debtor's complaints through the judicial administrators were admitted in an overwhelming percentage.[37] This victory for the moment cannot be enjoyed enough, given the legal framework that still allows this avalanche of executions to continue. Moreover, the situation has been complicated from a procedural point of view, related to the competence, the ways in which the debtors could obtain a provisional suspension, etc. We wonder who will bear the serious consequences of these uneven measures? In addition, based on these enforced executions started on the basis of GEO no. 88, comes the Directive that specifies that the suspension must be granted even before the insolvency procedure is reached, in the idea of allowing the debtor to stabilize, which is why even more so in the insolvency phase we can consider that the suspension is a "given" and must be kept as such. The initiation of forced execution procedures during the insolvency procedure seriously affects the guarantee of the insolvency character which in turn represents a shield of protection against a premature and uncoordinated liquidation of the debtor's assets and which benefits not only the debtor, but also the creditors, who have entered into a game, "of sacrifice"[38], and which by the new regulation risks to remain undetected to the credit of current creditors who demand execution and which may even be of lower rank. But in this context, where is the progress and what is the future of insolvency law and the economy in general?

The chance of changing the Romanian legislator's vision regarding the legal regime of insolvency is reflected in the future national transposition, both legislative and administrative, of the EU Directive on restructuring frameworks. The degree of harmonization achieved by an EU Directive depends on how it is transposed into the national laws of the Member States, especially since the Directive only sets minimum standards for preventive restructuring frameworks, discharge of debt and insolvency proceedings. However, we consider it a prudent approach, given the extremely diverse nature of the restructuring and insolvency procedures, as well as the different stages of the development of insolvency regimes in the different Member States. In our opinion, a real measure of uniformization of the provisions on insolvency at the level of the European Union would really materialize by adopting a Regulation on the restructuring and second chance frameworks, in addition to the already existing one which mainly deals with cross-border actions and competence. Such direct regulation would be easily sensitive to the approach, as Member States are not yet prepared at the national legal system level to give a unitary equation. We should mention that Romania, like the other Member States of the European Union, has the obligation to adopt and publish by 17 July 2021 the laws, regulations and administrative provisions necessary to comply with the Directive, with certain exceptions.

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[37] Regional Insolvency Conference - https://www.universuljuridic.ro/emisiunea-20-insolventa-la-ea-acasa-conferinta-regionala-de-insolventa-constanta-i/ , the date of last accessed 21.10.2019.

[38] Gheorghe Piperea, *Carecterele sacrificial, colectiv, concursual și necesar în procedura insolvenței*, "Curierul Judiciar" no. 7/2017, p. 398.

We cannot dispute that the Law no. 85/2014 brought substantial improvements to the field of insolvency and to the rescue of professionals in financial impasse, the national legislator based on good practices, the proposals of the law of the specialists, the doctrinal opinions, as well as the experience of other states whose legislation in the field is much more evolved. However, there are still many areas waiting for innovations, many aspects still unregulated or which pose problems in practice, such as, for example, environmental obligations, which are obligations to do, other than to pay a sum of money, they are not registered at the bankruptcy mass. In such cases, we find that the law was not conceived as a global architecture, but a niche. And this issue of environmental obligations is the preamble to an even wider problem, namely the treatment of current insolvency obligations, since, whether they are monetary obligations or simple obligations to do, current debts do not benefit from a payment order, such as previous ones that have predictability and safety. Thus, the simple obligations to do are not known at the opening of the insolvency procedure, and the current debts are paid according to the resulting documents, this "order" generating real difficulties in practice.[39]

We admit the need for a legislative reform in Romania, which is particularly focused on granting the second chance, in full accordance with the new EU Directive 2019/1023 on the restructuring frameworks and the emergency amendment of GEO no. 88/2018, all the more so as we hold the warning at international level about the triggering of a new economic crisis with an even more aggressive impact than the one of 2008. At the same time, we consider it advisable to point out some priority directions of legislative reform, such as: promoting the frameworks of preventive restructuring, which although at the script level, respectively the ad-hoc mandate and the preventive agreement, these remain more at the stage of theory than of practice, the regulation of several restructuring frameworks[40], as we find in other states, the express outline of some instruments for early warning of insolvency risk, the implementation of clear differentiation mechanisms from the beginning of insolvency proceedings between viable companies[41] for reorganization and so-called "zombie" companies [42], the creation of separate procedures for SMEs[43], as well as granting the second chance also to the professional natural person, to the category of the liberal professions, to the individual or family enterprises, through reorganization or through insolvency prevention procedures, for these debtors the legislator offering only the possibility of direct entry in the simplified bankruptcy procedure [44].

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[39] See V. Godîncă-Herlea, *op.cit* ., p. 23.

[40] For example, the new Polish legislative development opts for multiple restructuring modes, similar to the UK, and may be alternatives for jurisdictions that only know one type of reorganization procedure (such as Hungary). Thus, in 2016 Poland adopted a distinct status, following an analysis of Chapter 11 of the US insolvency law and the French law on the subject (also inspired by US law) and introduced four different types of restructuring procedures in the place of one alone. The European Parliament says that more alternatives are becoming a better formula for spreading the rescue culture, because businessmen can choose, and the possibility of choice itself seems to be a panacea against fear of bankruptcy and stigmatization - in the European Parliament's legislative resolution of 28 March 2019 on the proposal for a Directive of the European Parliament and of the Council on frameworks for preventive restructuring, second chance and measures to increase the efficiency of restructuring, insolvency and debt repayment procedures and amending Directive 2012/30/UE (COM(2016)0723 – C8-0475/2016 – 2016/0359(COD)) "-*http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2019-0321&format=XML&language=RO,* date of last accessed 21/10/2019.

[41] Simona-Maria Miloș Ștefan Dumitru, Andreea Deli-Diaconescu, Otilia Doina Milu, „*Reorganizarea"*, in Radu Bufan (coordinator), *Tratat practic de insolvență*, Hamangiu Publishing House, Bucharest, 2014, p. 644. Law no. 85/2014 brought as a novelty at the internal level the provision that "the observance of both the legality and the viability conditions, represents a condition of confirmation of the reorganization plan", the doctrine considering that by this regulation the union judge acquires besides the attributions of verifying the legality, and attributions in establishing the viability, the opportunity, the profitability of a business, which somewhat exceed its competence. However, the law does not prohibit the possibility of the syndic judge requesting a neutrally based opinion by an insolvency practitioner, an option that can confer a real and motivated vision on the viability of a reorganization plan, a court decision being informed without cause and without risk.

[42] In order to justify the effort and the assumption of the common "sacrifice" in order to rescue an enterprise, a clear differentiation between the viable and the non-viable ones is required, since, if a debtor in financial difficulty is not economically viable or its economic viability cannot be restored quickly, all these restructuring efforts could lead to acceleration and accumulation of losses to the detriment of creditors, workers and other stakeholders, as well as the economy as a whole ("zombie" companies).

[43] In this sense we can have as a legislative perspective *the draft law on a simplified insolvency regime for micro, small and medium-sized enterprises* under discussion in UNCITRAL Working Group V.

[44] Belgium also experienced a strong rise in the field of insolvency, in this country being already regulated a Code of economic law, a Code that was resized and republished on 13 July 2017, the Belgian legislator adopting and inserting the draft law Book XX, which

Although we are witnessing a deficient legislative system or in total imbalance with the economic and social reality, vulnerable at the same time, in contrast to the guidelines and principles elaborated at European and international level, which we have assumed through accession, we are content, in the meantime, to adopt abstract and often without purpose opinions issued at the level of the Committee on European Affairs [45] , how, in fact, also with regard to Brexit, Member States are trying to unite and coordinate the legislative and administrative "barriers" of protection, taking into account these opinions. Thus, at national level has recently been issued the *Decision no. 45 of 24 September 2019 on the adoption of the opinion on the Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank - Addressing the impact of the UK's withdrawal without agreement from the UK: a coordinated EU approach* - COM (2019) [46], decision by which it supports the financial support from the Union to mitigate the economic effects of a disorderly withdrawal from the United Kingdom from the Union, taking into account the interests of workers, employers and citizens of the Union, and which is also recommended as support for small and medium-sized enterprises, which carry out transactions with the United Kingdom and which have less means to prepare than large companies and do not always have the administrative and legal capacity required to implement a complete contingency plan, be accompanied by a support plan with practical, legal and procedural information on trade with the United Kingdom, recalling the need for cooperation between the United Kingdom and EU-27 in ensuring international rules-based trade and in the efficient functioning of the International Trade Organization.

4. Conclusions

Beyond the criticism of inefficient regulations or contrary to European and international law, the innovations of Law no. 85/2014 have increased the efficiency of insolvency proceedings, undoubtedly representing a major step in drafting a modern and ambitious legislation in keeping with the European Union model jurisdictions and those highlighted internationally. Keeping up with international and Union model laws is not limited to an abstract and often uneven implementation in the general context through unconditional access to information in an impacted world of digitalization and globalization. Survival and adaptation in such a world whose future becomes uncertain under the pressure of the flow of information and the combination of cultures, in which the problem is no longer the access to knowledge, but their exploitation, consists in the capacity to discover opportunities, in the capacity to use them and avoidance in remaining "locked" in a kind of *"filter bubble*" which digitally configures your own "bubble" of truth and perspectives.

Legislative gaps, related internal rights, in particular fiscal law, as well as regulatory

revolutionizes the insolvency regime by adopting new measures, as well as by transposing Regulation no. 848/2015 but also numerous regulations in the Proposal of the Directive no. 2016/0723, approaching a second chance for economic operators and not only becoming one of the central objectives of the Belgian reform. The new law covers all entities, including the category of liberal professions, with the exception of legal persons under public law (state, regions, cities, provinces), their goods being exempt from seizure due to the purpose and mission of performing the public service. Indeed, the Belgian law system today offers the possibility of tackling three forms of judicial reorganization, namely jointly reorganization ("Réorganisation par agreement amiable"), reorganization by collective agreement ("Réorganisation par agreement collectif") and reorganization by transfer ("Reorganization by transfer"). See Cedric Alter, Zoe Pletinckx, „*Depistage, mesures provisoires et reorganisation judiciaire (nouvelles dispositions)*", in Cedric Alter (coordinateur), *Le nouveau livre XX du Code de droit economique consacre a l'insolvabilite des entreprises*, Larcier, Bruxelles, 2018, pp. 133-152.

[45] Resolution no. 42 of 18 September 2019 on the adoption of the opinion on the Joint Communication to the European Parliament and the Council - European Union, Latin America and the Caribbean area: joining forces for a common future JOIN (2019), published in Official Gazzette no. 764 of 20 September 2019, in which it is recommended, inter alia, to support the access of small and start-up businesses to the Latin American and Caribbean market by financing economic missions, seminars and meetings with the most diversified participation of representatives of commercial companies (.. .), actions aimed at informing about commercial opportunities, customs provisions, import-export procedures, applicable standards and the market for digital services".

[46] Published in the Official Gazette no. 782 of 26 September 2019. See also in this regard the *Decision no. 693 of 12 September 2019 of the Council of 25 March 2019 on common rules ensuring basic road freight and road passenger connectivity with regard to the withdrawal of the United Kingdom and Northern Ireland from the Union*, published in the Official Gazette no. 759 of 18 September 2019.

uncertainty, modified unevenly and chaotically, in inconsistency with the international and international guidelines, such as the Emergency Ordinance no. 88/2018 for the modification and completion of some normative acts in the field of insolvency and other normative acts, which prioritize the budgetary system to the detriment of Romania's economic-social interest, continue to create major barriers to the evolution of an insolvency law that really contributes to the development of a sustainable economy.

The situation becomes also worrying from a global perspective, in the sense that the global bodies, especially the IMF, have had to keep revising the global economic growth downwards, reaching 3.2% for 2019 and 3.4% for next year,[47] materialized in the smallest global growths since the global economic crisis of 2008. The meetings from October 2019 between the International Monetary Fund and the World Bank ended with a common call to support global growth, currently stagnating amid US-China trade conflicts and uncertainty over Brexit, given that *"*we are at a time when world growth has slowed, investments are weak, industrial activity is not very dynamic and commercial exchanges are getting weaker".[48]

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