(R)evolution of the insolvency law in a globalized economy

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Abstract

This study aims at highlighting the image of insolvency law as it was outlined, ascendingly developed and reached the remodelling stage in an international economic context, in a globalization era where the approach of interdisciplinarity and transdisciplinarity is no longer only mere philosophical theory, but is manifested instead through the interference and inter-connexion between fields of law and dimensions of political, economic and social factors, the need to identify a coagulating factor through the so-called harmonization of the norms of law, of the jurisdiction and of the international, EU and regional practices, as well as a reporting of the best practices in the field becoming key factors in the qualitative management of insolvency risks, an institution which is individualized, at the same time, in a new field of law, an autonomous law that has gone beyond the borders of commercial law and has also expanded over individuals and territorial and administrative units, law present in interference with the monist system implemented by the new Civil Code but also driven, in its evolution, by principles promoted at European Union level, and also at international level.

Keywords: *insolvency, globalization, reorganization, interdisciplinarity, comparative law, international economic order, international trade.*

JEL Classification: K22, K33, K35

1. Introduction. Let's "open the gates" of an interdisciplinary area - insolvency. A social-legal-economic "coagulation"

Globalization has created a multidisciplinary, interdisciplinary legislative universe, the legal regime of insolvency evolving in this manner of legislative, economic and social cohesion, by creating a complete and complex framework that has gone beyond the boundaries of the traditional branches of law by incorporating social, economic, administrative, and management factors, law showing a flexible legal sizing and management, adapted to the needs that are required in times of economic crisis, global conflicts and problems. This phenomenon allows us to perform a transparent analysis of functional insolvency practices and implicitly of reorganization, recovery, debt remittance, providing alternative models in outlining

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and substantiating a viable law, which is nonetheless adapted to the economic, political, cultural and organizational state of each country, which is why we are benefiting today from the cultivation of a system of law that has gradually abandoned the position of autonomous, closed system and has inevitably headed towards an open, flexible, integrative, interdisciplinary, complex, specific system, which are, as a matter of fact, characteristics of our century, a century of complexity.

It is very interesting how, for example, certain prestigious universities in the UK, such as the University of Warwick, established centres specializing in Global Economy - The Centre for Law, Regulation and Governance of Global Economy (GLOBE) – which acts as a platform for research and debate between students, professors from several university centres, national and international organizations and institutions, in an interdisciplinary manner that targets social, economic and political areas such as international business law, the international law on foreign investments, intellectual property rights at global level, financial law, international competition, international arbitration, etc.[3]

The field of insolvency is on the agenda of the interests of international and Union bodies and institutions, such as the World Bank, the Organization for Economic Cooperation and Development, the United Nations Commission on International Trade Law, the World Trade Organization, the European Commission and the European Parliament, and analysis reports reflecting insolvency "around the world", statistics, model framework regulations, courses of action, legislative and economic solutions, have recently been published, which we will approach in this research, the institution of insolvency being restructured in almost every law system, a "culture of salvation" being promoted and developed as a priority – the second chance, the reorganization, the fresh start and elimination of the bankruptcy stigma by prioritizing new interests in the context of economic and social cohesion

Romania is inevitably part of this process of integration and reflection of its own identity in a European and global context, globalization succeeding in eliminating many of the symbolic boundaries between the legal culture promoted by Common Law, the one promoted by our system deeply marked by the Romano-German system, but also by the legal system outlined by the realistic American trends, thus allowing the law to become the result of self-adaptation of the society, and not just of the creation of the state. At internal level, the insolvency law seems to have been able to absorb, and embody the directions, and principles promoted in a national and international context, benefiting, in recent years from an expansion, a legislative revolution in this field. In an integrative vision, Law no. 85/2014 on Insolvency Prevention and Insolvency Proceedings, deemed in the specialized literature to be a genuine Insolvency Code, including in a single corpus of legislation, the general legislation applicable to all economic operators, the special legislation applicable to credit institutions and companies in the insurance field, to groups of companies, as well as regulations on cross-border insolvency, to which the insolvency prevention instruments are added, more specifically the ad hoc mandate

[3] *https://warwick.ac.uk/fac/soc/law/research/centres/globe/about/*, date of the last visit 05.11.2018.

and the arrangement with creditors, while benefiting from the existence of its own principles[4] that can be found in its entire structure, proceedings and resources for excluding and filtering rules coming from outside that are specific to other branches of law. Moreover, we could take into consideration the idea of resizing this so-called code by outlining a much more complex Insolvency Code that absorbs the regulatory framework which is distinctive for the moment, such as Law no. 151/2015 on the insolvency of natural persons, and the insolvency of the administrative-territorial units respectively, regulated by 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 principles and practices substantiated at European Union and global level. This perspective finds its foundation in the essence of the modern normative goals of insolvency for all the topics of law to which it is addressed, which outline the foundations of a so-called "rescue culture" promoted extensively at European Union level and beyond, in order to identify a balance between the interests of the debtor and those of the creditors, by the constructive harmonization of the norms on *judicial reorganization*, regulated by Law no. 85/2014 on Insolvency Prevention and Insolvency Proceedings, *financial recovery* according to Government Emergency Ordinance no. 46/2013 regarding the financial crisis and the insolvency of the administrative-territorial units, as approved by Law no. 35/2016, as well as the well-deserved *fresh-start* granted to natural persons, as regulated by Law no. 151/2015 on the insolvency of natural persons, currently, the institution of insolvency highlighting new valences, which we call valences of equity, which rebalance to a certain extent the position between the economic dimension and the social dimension of this institution.

Starting from the reality of an order of law deeply marked by the dynamics of agreements and of the international and regional commercial, social and political, etc. relationships, this paper stands out by an *in globo* research of the main legal and economic directions outlined in international and national context, in an attempt to identify the best practices and substantiating solutions for the norms concerning the legal regime of insolvency, while also taking into account the last changes brought through Government Emergency Ordinance no. 88/2018 on this institution that are meant to revolutionize to a certain extent everything that has been attempted to "build" in recent years, more specifically, redirecting insolvency to a new beginning, "the second chance", "fresh-start" and abandoning the bankruptcy stigma, upsetting the economic environment that is facing new challenges, the chance of reorganization losing ground again in favour of the bankruptcy proceedings.

[4] Currently, Law no. 85/2014 lists thirteen principles that govern the new regulation, which are taken over from the World Bank principles, The European principles on insolvency and the UNCITRAL Guide on insolvency. Their integrative function reflects the interest of the Romanian legislator in implementing, at internal level, the entire "architecture of insolvency", as these principles can be found throughout the entire normative structure of the Insolvency Code, certainly adapted to the difference of structure, goal, concepts and formulations.

2. Globalization. Between commercial strategies, agreements and partnerships

"International trade is a mere fact, but a fact that has given rise to international law in its entirety"[5] remains an statement that strengthens the importance of economic relationships with an international character, which involve countries as well as companies, commercial and financial exchanges, more specifically the role of the economic dimension in outlining this universe of international rules, which also coincides with the social and legal dimension. The creation of an international economic order and the necessity of its normative integration led to the construction, at least at the doctrinal level, of many branches, new fields of law, which represent fragmentations, sub-branches of the public or private international law, but which are claiming the autonomy of distinctive law branches, such as the international economic law, the international trade law, the international law of foreign investments, etc. Nevertheless, the international economic order goes beyond the law of international trade, because it is not limited to inter-company relationships, which is why we are referring to what judge Phillip Jessup from the International Court of Justice says: "international law is becoming more and more a transnational law that would mean an integrated body of rules from the international law and the domestic law which regulates the conduct of states and individuals, the competition and functioning of markets, the movement of public and private goods"[6]. We can think only of what we refer to as transdisciplinarity[7] today, while international law remaining the foundation of new legal constructions that are nothing more than instruments of economic integration and the regulation of market relationships, both at regional level, within the European Union, and at world level within the World Trade Organization. One thing is certain, regardless of the fragmentation and dissemination of the branches of law, which eventually complement each other and are harmonized in an interdisciplinary manner, "international law preserves its regulatory function, meaning that, from the time when norms are drafted or consecrated in a customary manner, a limitation of the margin of the economic activity of governmental and non-governmental actors is made.[8] The economic integration is triggering a continuous mechanism for the codification of the international norms of law, doubled by a rich jurisprudence in the general framework of the international economic relationships that constitute the

[5] D. Carreau, P. Juillard, *Droit international economique*, edition 3, Dalloz Publishing House, Paris, 2007, p.1, *apud* Cristina-Elena Popa Tache, *Introducere in dreptul internațional al investițiilor,* Universul Juridic Publishing House, Bucharest, 2018, p. 9.

[6] Cristina-Elena Popa Tache, *op. cit.*, p. 10.

[7] See Ionel Didea, Diana Maria Ilie, Roxana Denisa Vidican, *The interdisciplinarity of the scientific research of law. The insolvency - an integrative area configured and resized by the intersection of the legal, economic and social realities,* „Agora International Journal of Juridical Sciences", no. 2/2017, available on - http://univagora.ro/jour/index.php/aijjs/article/view/3155, date of the last visit 06.11.2018.

[8] Adrian Năstase, Ion Gâlea, *Dreptul internațional economic*, C.H.Beck Publishing House, Bucharest, 2014, p. 6.

basis of multi- and bilateral agreements for their effective implementation and the outlining of what is called international economic order in a globalized world, i.e., in a universal system in which we anchor the economic dimension into the social, legal reality, blending common interests such as the environmental protection, the green economy, biotechnology, artificial intelligence, digital technology, etc., designed to lead to the promotion of adequate governmental policies.

In a world of international treaties, multi and bilateral agreements, and also regional agreements, international organizations and institutions to which states have adhered, and within which global power games are organized in the global trade through strategic partnerships that strengthen the roles of certain global actors, global leaders in global problem solving, the new international economic order is outlined, aiming to be an international rules-based order, as argued in the three summits that took place in July 2018. Thus the BRICS countries (Brazil, Russia, India, China and the Republic of South Africa) met in Johannesburg on 25-27 July 2018, highlighting the support of the multi-polar order and the need to increase their collective role in international affairs, inviting in the debates many non-BRICS participants, such as Argentina (the holder of the chairmanship of G20 by turns), Indonesia (co-chair country together with the Republic of South Africa of the new Africa-Asia Strategic Partnership), Egypt (holding the current chairmanship of the G77 plus China Group), Turkey (chairmanship of the Organization for Islamic Cooperation) and the Secretary-General of the United Nations Organisation, substantiated in joint intra-BRICS cooperation declarations on specific fields such as economy, finance, national security, trade, health, research, education, urbanization, science and technology, digital economy development. The organization of the 20th EU-China Summit on 16 July 2018 in Beijing also brought to focus the commitment to multilateralism and international rules-based order, with the United Nations Organization as a central element. The joint declaration focused on promoting an open global economy, "continuing the liberalization and facilitating trade and investments through an open, balanced, inclusive globalization, for the benefit of all." The common support for rule-based trade was also highlighted, reaffirming the joint commitment to the reform of the World Trade Organization: „it is the common task of Europe and China, but also of America and Russia, not to destroy this order but rather to improve it ... not to trigger trade wars that have led to open conflicts so often in our history, and to reform with courage and responsibility the international rule-based order ... with the main objective of consolidating the WTO as institution and ensuring a level playing field".[9]

In the global space, the place and role of the European Union is defined by its own development strategies, according to Eurostat data (the EU Statistical Office), the economy of the 19 countries in the euro area rising by 2.5% in 2017 (the highest growth rate since the one reached in 2007), the IMF thus announcing an improvement in the global economy, especially in Europe and Asia, the two largest

[9] Iulia Monica Oehler-Șincai, *Trei summit-uri importante din perspectiva Noii ordini economice internaționale*, „Tribuna Economică", no. 36/2018, pp. 69-72.

economies of the Eurozone that grow being France and Germany[10]. Nevertheless, the gaps related to the GDP/capita between the EU and the US are very high, all the more so as the growth rates of the US economy are consistently higher than the European ones[11]. As a matter of fact, the European Union is moving towards the completion of the Europe 2020 strategy[12], a cohesion policy aimed at adopting integrated guidelines on areas of application, finalized by drawing up country reports that allow Member States to develop their own strategies for returning to a sustainable economic growth and the sustainability of public finances, with most of the funds being allocated to less developed European regions in order to recover the existing economic, social and territorial disparities that continue to subsist at Union level, prioritizing an economic development based on knowledge and innovation in balance with a high rate of employment, meant to provide social and territorial cohesion[13]. In the content of the guidelines and objectives for Romania, mention was made of the need to improve SMEs' access to the single market and the development of entrepreneurship through concrete policy initiatives, including through the streamlining of trade company law (bankruptcy proceedings, the statute private companies, etc.) and through initiatives enabling entrepreneurs to re-launch after bankruptcy, the Commission ensuring the maintaining of an open single market able to protects the equal opportunities of enterprises and to tackle national protectionism.[14]

According to the data of the Ministry of Foreign Affairs, the Annual Growth Survey (AAC 2018) [15] maintained strategic priorities such as boosting investments to support the economic recovery and long-term growth, continuing structural reforms for inclusive economic growth, increased convergence and competitiveness, ensuring responsible fiscal and budgetary policies to support sustainability and

[10] Emilian M. Dobrescu, *Europenizare 2017 și primele 6 luni din 2018*, „Tribuna Economică" no. 30/2018, p. 67.

[11] See Lorena Duduială Popescu, *Locul și rolul UE în spațiul global,* „Tribuna Economică" no. 32/2018, pp. 69-72.

[12] Now that strategy 2020 is almost completed, the European Union prepares to create a new strategy and for difficult discussions concerning the next budget, i.e. 2021-2027, Brexit automatically implying an increase in the contribution of the EU governments to the common budget, the President of the European Commission Jean-Claude Junker stating on 8 January, 2018 that "we need to find ways to react to the loss of several billion euros caused by the departure of a significant contributor, such as Britain", while on 2 May, 2018, the European Commission presented in the European Parliament the EU budget for the 2021-2027 period, and the President reoriented the strategy by devising a plan meant to lead to results with less resources, i.e. a better financial management by implementing the first mechanism concerning the rule of law. As a matter of fact, the European Commission will make the EU financing conditional upon the respect of the rule of law, a mechanism that will protect the EU budget from financial risks related to the generalized deficiencies that affect the rule of law in the Member Countries. – For development, see Emilian M. Dobrescu, *op. cit*., pp. 67-72.

[13] See Dan Drosu Șaguna, Daniela Iuliana Radu, *Politica de Coeziune a Uniunii Europene. Strategia Europa 2020*, C.H. Beck Publishing House, Bucharest, 2016, pp. 124-132.

[14] *https://www.mae.ro/sites/default/files/file/Europa2021/Strategia_Europa_2020.pdf*, date of the last visit 05.11.2018.

[15] *http://afacerieuropene.mae.ro/node/266*, date of the last visit 05.11.2018.

convergence, with the message „to relaunch the economic and social convergence process across the entire Union". In this context of Europeanization and globalization, Romania benefits from many strategic development partnerships, actively participating in cohesion and accession policies, currently having numerous objectives related to the consolidation of the Economic and Monetary Union both from the perspective of a non-euro Member State and a state aspiring to the Eurozone, through the Convergence Program 2018-2021[16], aiming at obtaining a positive impact on the business environment and the purchasing power through economic and social progress made in a favourable European and global context. At international level, Romania is currently benefiting from strategic partnerships with economic and financial institutions such as the World Bank Group[17], which coordinates its policies with the International Monetary Fund, cantered on ensuring economic growth and the creation of jobs, in order to reduce poverty through the improvement of the business environment, managing state-owned companies, promoting innovation and the digital agenda for competitiveness[18], the European Bank for Reconstruction and Development[19] (Romania is has been an EBRD member since 1991) created with the purpose of assisting the countries in the Central Europe and Central Asia in the development of the market economy, the Organization for Economic Cooperation and Development (OECD) [20], yet another strategic objective of the Romanian foreign policy included in the current governance program, Romania officially applying for accession to the OECD on the occasion of the previous enlargement exercises, namely April 2004 and November 2012, renewing it in 2016 and 2017[21]. According to the MFA, in recent years,

[16] *Programul de convergență 2018-2021*, in „Tribuna Economică", no. 22/2018, p. 64.

[17] Following the economic development, it is foreseen that, in the near future, Romania will move to a new stage of its collaboration with the World Bank, a time when our country will no longer be able to implement projects of the institution on its territory. Romania will remain a full member of the World Bank Group, but will gain a new status within the international financial community, compatible with its EU membership and the donor status within the international policy of cooperation for development. - *http://www.mae.ro/ node/1471*, date of the last visit 05.11.2018.

[18] The World Bank Board of Directors approved a new Country Partnership Framework (CPT) with Romania over a five-year period, which has as priorities the investments in people, the support for a more dynamic development of the private sector and a higher degree of preparedness to natural disasters and climate change, underlining that the private sector, while being a dynamic one, is small and with limited access to finance, especially for SMEs and micro-enterprises. - See *WORLD BANK GROUP - Creștere sustenabilă și incluzivă*, in "Tribuna Economică", no. 27/2018, p. 64-65.

[19] *http://www.mae.ro/node/1476*, date of the last visit 05.11.2018.

[20] The OECD is an intergovernmental forum dedicated to identifying, disseminating and evaluating the implementation of appropriate public policies to ensure sustainable economic growth and social stability. The 35 OECD members (of which most Europeans - 23) are developed countries, accounting for more than 70% of global production and trade and 90% of the world's foreign direct investments.

[21] The main advantages of Romania's possible accession to the OECD would be: the benefit of Romania's membership into the limited club of developed economies and the implicit acknowledgment, at global level, of its status of functional market economy and consolidated democracy, impacting on country rating and attracting foreign investments; the benefit of the example, Romania's favourable image to the big economies of the world (USA, China, Japan, etc.), as well as to the European countries in the region with aspirations (Republic of Moldova, Macedonia, Albania, Serbia, etc.); the benefit of expertise, the access to the required information in areas that

Romania has stepped up its efforts to participate in the working formats of the OECD and for taking over the standards, good practices and recommendations of the organization, currently holding the status of participant, associated or invited in 42 OECD structures following the adoption of the 35 legal instruments of the organization, underlining at the same time that „the acceptance of our country as a participant in the DAC is an additional asset to Romania's OECD accession dossier".[22]

This international legal order, dynamically shaped by the strategic development of global financial markets, has led to significant changes in the structure of trade relationships, the international integration of the economy inevitably creating social, economic, and legal interdependencies, and forcing some national laws and different legal systems to re-codify and redimension their internal legislation through a coordinated harmonization of international and regional bodies that have created laws and model principles needed to stabilize the new economic arena. And yes, we have to admit that the harmonization at European Union level has also come about through the effect of the public international law through international conventions that have resulted in the imposition of common standards in areas such as the sea law, maritime and air transport, and international trade, in particular through the General Agreement on Tariffs and Trade (GATT) and the Directives drawn up by the World Trade Organization (WTO).[23]

The harmonization of the insolvency legislation through a coordinated intervention of the Union legislative body as well as by the guiding ideas of international cooperation and integration bodies and institutions, becomes necessary in the context of a globalized world in which international business has developed and companies are operating in several regions through numerous subsidiaries, restructuring through reorganization and liquidation in various forms and in several countries at the same time of a company becoming a real legislative challenge.

3. New Union and international "coordinates" in the outlining of the insolvency regime

The coordinates outlined at the level of the European Union aim at stimulating and strengthening the legislation oriented towards rescue mechanisms of the debtor as well as proceedings for debt repayment or debt adjustment in relation

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are a priority for Romania (governance framework, legislative reform, anti-corruption, fiscal policy, transport infrastructure, agriculture, education, etc.); the benefit of Romania's access to OECD's economic decision-making instruments and centres and the possibility to contribute to the global economic governance; the benefit of assistance in relation to public policies from the OECD members, by regular assessments of Romania's policies in specific areas (*peer reviews*) and issuing recommendations on their improvement - *https://www.mae.ro/node/18539,* date of the last visit 06.11.2018;

[22] *https://www.caleaeuropeana.ro/romania-aderare-ocde-comitetul-de-asistenta-dezvoltare/,* date of the last visit 06.11.2018;

[23] See Gheorghe Bocșan, *Armonizarea, apropierea legislațiilor și stabilirea de standarde minime in dreptul Uniunii Europene*, „Dreptul" no. 7/2018, pp. 117- 151.

to consumers and with self-employed persons, provisions recently entered in force of EU Regulation 2015/848[24], extending its scope by including pre-insolvency proceedings and those providing for the early restructuring of a company at a stage where there is only a probability of insolvency, but does not achieve sufficient harmonization of Member States' laws on insolvency. In Romania, the mentioned Regulation has direct application in the regulation of international relationships in the field of insolvency in relation to the Member States of the European Union, as regards the non-EU third states, the rules of private international law contained in Law no. 85/2014 on "Cross-border insolvency", Romania taking over the model law on the international insolvency of UNCITRAL. Mention should be made of the fact that the proceedings for the insolvency of administrative-territorial units, aimed at overcoming the situation of financial imbalance, a special legal regime regulated by Government Emergency Ordinance no. 46/2013 and approved by Law no. 35/2016 does not fall within the scope of the Regulation and includes only natural or legal persons, traders or private debtors, subject to the existence of an extraneous element, the provisions applying only to insolvency proceedings in which the centre of main interest (COMI)[25] is located in the European Union, the determination of which has given rise to rich jurisprudence developed at the level of the Court of Justice of the European Union, the interest being outlined both by the establishment of the competent jurisdiction and the prospect of the application of the Regulation in space[26]. The Regulation also requires the creation of insolvency registers interconnected at the Union level through the e-Justice portal as well as the publication of court rulings, which allows creditors, insurers and insolvency practitioners to verify in real time the existence of parallel insolvency proceedings, ensures more active cooperation between the Member States in this area, and also transparency. Nevertheless, in the context of business globalization, the territorial limitation of the application of the Regulation becomes an impediment (we have complex causes with secondary proceedings initiated in non-EU countries such as in the Nortel case[27]) in administering international insolvency proceedings, the interests of the debtor and creditors alike being destabilized through the lack of clear, coherent and harmonized rules, very few countries transposing the Model Law internally

[24] Regulation no. 848/2015 on the insolvency proceedings repealed Regulation of the European Council no. 1346/2000, its text being reformed to take into account the evolutions on the legislations of the Member States on the insolvency prevention proceedings, as well as the jurisprudence of the Court of Justice of the European Union. This is applied to insolvency proceedings opened starting with June 2017.

[25] Art. 3 para. (1) of the Regulation capitalizes the jurisprudence of the CJEU and redefines COMI – "center of main interest"- as being "the place where the debtor usually manages its interests and which is verifiable by third parties".

[26] Art 28 of the Directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU supplements the Regulation, establishing that the COMI transfer is no longer possible during the reorganization proceeding – „*Le transfert du centre des intérêts principaux du débiteur, au sens du règlement (UE) 2015/848, n'est pas autorisé pendant les procédures de restructuration*..."

[27] See Marcela Comșa, *Regulamentul privind procedurile de insolvență, Jurisprudența Curții de Justiție a Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2017, p. 345.

(Great Britain and Romania have fully transposed it, but countries such as Germany, Austria, Portugal have not shown interest in this international tool). We are mentioning that the Regulation makes reference, in recital 48, to the principles and guidelines adopted by European and international organizations active in the field of insolvency law, in particular the guidelines drawn up by UNCITRAL. Romania has an important role to play in strengthening the insolvency principles and guidelines, due to the fact that it is part of the UNCITRAL Insolvency Working Group V, together with 12 other EU Member States, within which aspects related to insolvency proceedings are debated. Indeed, not only at the level of the European Union, an attempt is made at finding the best and most viable solutions to deal with the insolvency phenomenon, but also at the global level, at present, the United Nations Commission on International Trade Law having the strategic plan of action, a project to improve the model Law in the field of international insolvency. As a matter of fact, the agenda of the last session held in May 2018 in New York focused on subjects and debates such as the facilitation of international insolvency proceedings, focusing on business groups but also on small and medium-sized enterprises as well as proposals for improvement, restructuring and interpretation of the Model Law, the 54th meeting to be held in December 2018 in Vienna[28]. The report of the UNCITRAL Working Group V issued in July 2018[29] was also finalized with a draft law on the recognition and enforcement of insolvency judgments, as a model for incorporation into national law, annexed to the report, a project to be carried out and to be brought into discussion in order to be approved at the next meeting, with the main objectives of ensuring the rapid recognition and enforcement of insolvency judgments, avoiding the overlapping of the insolvency proceedings and increasing the security of debtor's and creditor's rights in insolvency proceedings, such as the protection of the debtor's assets and the maximization of their value.

A legislative revolution and evolution towards the outlining of a distinctive perspective of approaching and reconfiguring the insolvency law oriented towards prevention, granting a second chance and restructuring, was triggered by Recommendation no. 135/2014 of the European Commission concerning a new approach to business failure, setting objectives, such as guaranteeing and access of the viable companies facing financial difficulties, regardless of the place in the Union where they are established, to national insolvency frameworks that should enable them to structure their business at an early stage in order to prevent their insolvency and to maximize the total value for creditors by adopting different liquidation measures for honest entrepreneurs compared to dishonest entrepreneurs and developing accelerated proceedings for enterprises that have gone bankrupt in an honest way promoting entrepreneurship, investment and employment for a better

[28] *http://www.uncitral.org/uncitral/fr/commission/working_groups/5Insolvency.html*, date of the last visit 06.11.2018.

[29] Available online at: *https://documents-dds-ny.un.org/doc/UNDOC/GEN/V18/033/63/PDF/V1803363.pdf?OpenElement*, date of the last visit 06.11.2018.

functioning of the internal market[30]. The reality is that the desired impact at the level of uniform changes in all Member States has not been achieved in order to facilitate the rescue and the second chance of debtors in difficulty, the implementation of the Commission Recommendation of 12 March 2014 on the second chance being assessed[31] two times, in 2015 and in 2016, respectively. In this respect, a proposal for a Directive on Preventive Restructuring Frameworks, the second chance and the measures to increase the efficiency of restructuring, insolvency and debt remittance proceedings, which amends Directive 2012/30/EU, reinforces the 2014 Recommendation of the Commission and supplements Regulation 2015/848. The Directive mainly targets entrepreneurs, natural or legal persons, with the possibility to extend the application of debt remittance mechanisms to individual consumers, the objectives being: introducing essential principles to ensure the effectiveness of the preventive restructuring framework and the second chance framework, streamlining the insolvency proceedings by reducing the duration and related costs and by improving the quality of these proceedings, the establishment of specialized rules to increase the efficiency of the restructuring frameworks and rules on early warning instruments, preventive restructuring frameworks, which require proceedings to continue the activity even if the entrepreneur has financial difficulties, the second chance for entrepreneurs (starting a new economic activity after the first insolvency), measures to increase the efficiency of structuring, insolvency and second chance (minimum standards for the appointment, supervision and remuneration of insolvency practitioners). The European Commission plays an important role in the development of a "rescue culture", at the expense of a „culture of liquidation," stating that the preventive restructuring and the second chance for debtors contribute to the increase of investments and the possibilities of employment in the single market and, at the same time, the reduction of the unnecessary liquidation of viable commercial companies by preventing the accumulation of bad loans by facilitating cross-border restructuring.

The European Parliament's report of 21 August 2018 sets out the amendments to the Directive, as set out in the ordinary legislative procedure[32], reconfirming the need for harmonization in the field of restructuring and the second chance for the smooth functioning of the single market *"Un degré plus élevé d'harmonisation dans le domaine de la restructuration, de l'insolvabilité et de la seconde chance est donc indispensable pour le bon fonctionnement du marché unique en général et de l'union des marchés des capitaux en particulier et pour la viabilité des activités économiques",* also highlighting the importance of prevention and of the use of the pre-insolvency proceedings . In a press release[33] from

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[30] Mirela Iovu, *Efectele implementării Recomandării Comisiei Europene no. 135/2014 privind o nouă abordare a eșecului in afaceri și a insolvenței*, „Revista Română de Drept al Afacerilor" no. 4/2015, pp. 121-133.

[31] See Marcela Comșa, *op.cit.*, pp. 353-357.

[32] *http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2018-0269+0+DOC+XML+V0//FR*, date of the last visit 06.11.2018.

[33] *https://www.consilium.europa.eu/ro/press/press-releases/2018/10/11/directive-on-business-insolvency-council-agrees-its-position,* date of the last visit 06.11.2018;

11.10.2018, the Council of the European Union expressed its position on the Directive, considering that it offers a second chance to failed entrepreneurs who, nonetheless, have a good reputation and introduces measures to increase the efficiency of restructuring proceedings[34], insolvency and debt relief, the objective of the three institutions - the European Commission, the Council of the EU and the European Parliament - is to reach a political agreement before the European elections of 2019. Although we could consider that insolvency can be prevented through awareness of the causes of difficulty it causes, the manager restructuring in good time the loans/debts or the business, and by resorting, why not, to out-of-court methods, such as simple voluntary negotiation, according to the Guide for the Out-of-court restructuring of the commercial obligations of the company, issued by the World Bank, assisted voluntary negotiation - mediation[35] (methods rather rarely approached due to the imbalance of forces), respectively pre-insolvency proceedings, ad hoc mandate or the agreement with the creditors, proceedings increasingly brought to the attention of professional traders with the improvement of regulations in this area, we cannot deny that an economic context like the one in recent years, characterized by the unpredictability of business environment dynamics, niches of economic interest have certainly affected even established debtors in the market. We believe, however, that bankruptcy should become an objective, not just of the debtor but also of the stakeholders, only in the situation of businesses that have no chance, leaving the business environment and discharge of debts representing a benefit to the economic environment in such situations. This "rescue culture" can only materialize at the internal level of each country, Article 27 of the above-mentioned Directive invoking precisely the need to support debtors in difficulty through administrative, legislative, commercial and financial policies, ensuring concrete means made available by institutional and institutional strategic bodies to facilitate the creation of a new enterprises, businesses, - *"Les États membres veillent à ce que les entrepreneurs bénéficiant d'une seconde chance aient accès à des informations pertinentes, à jour, claires, concises et aisément compréhensibles quant à la possibilité d'obtenir un soutien administratif, juridique, commercial ou financier sur mesure ainsi qu'à tous les moyens mis à leur disposition pour faciliter la création d'une nouvelle entreprise."* In reality, pre-insolvency proceedings are used too little, and too few debtors benefit from the success of a reorganization plan at internal level, for example, in most cases bankruptcy being inevitable (95% of cases), the judicial administrator having an essential role in transmitting information and possibilities for creating a viable reorganization plan, which, in a context of formal analysis and verification without real business advice, there is no separate body of reorganization practitioners and bankruptcy

[34] As specified by the Austrian Minister of Justice „*each year, 1.7 million people lose their jobs because their enterprise goes bankrupt. Consequently, we must have robust norms on insolvency across the EU in order to reduce the number of bankruptcies, in order to make sure that entrepreneurs with a good reputation benefit from a second chance".*

[35] See Simona-Maria Miloș, *Prevenția insolvenței prin mijloace contractuale*, „Curierul Judiciar"' no. 6/2013, pp. 337-338.

practitioners, the proceedings being diametrically opposed, dramatically reduces the chances of recovery through a reorganization, „incompletely organized"[36].

The Europeanization and globalization have created not only a rule of international law order, by outlining laws and model principles, a Community acquis regulating and managing the economic crisis situations through a revolutionary insolvency, but has favoured opportunities to set up bodies, associations created in a multidisciplinary manner, with the stated purpose of regional and international insolvency research and cooperation, through a transparent exchange of information and ideas, best practices in the field, through periodical conferences and publications, the active participation in government debates to substantiate and shape regulations in the field. We mention INSOL Europe[37], in its turn, a member of the INSOL International Federation[38], with a strategic role in substantiating the guiding principles in drawing up insolvency codes, international laws, following the extraction of best practices and solutions by setting up working teams "around the world", by interest groups, in collaboration with the World Bank and the OECD – "*A member driven network, maximising global economic value by improving solutions to cross-border issues, advancing restructuring and insolvency systems through the deep expertise of our members"*[39]. The declared vision is that of a global association that influences the restructuring within insolvency practices and policies supported by partnerships that also promotes this global perspective. Recently, in the INSOL Europe 2018 Annual Congress[40], held in Athens, Greece, in October, debates were held on the digitization of insolvency proceedings, on insolvency prevention proceedings and on reorganization through efficient recovery plans in the context of the Directive proposed by the European Commission on prevention proceedings, second chance and measures to increase the efficiency of the reorganization/insolvency process, also in view of the European Parliament's report updating the Directive referred to above but also the first year of application of EU Regulation 2015/848, with its effects starting in June 2017, focusing on the law-economy relationship and its future.[41]

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[36] Vasile Godâncă Herlea, *Legea no. 85/2014, un drum către maturitate*, in Journal of the National Union of Insolvency Practitioners in Romania „*Phoenix"*, no. 65/2018, pp. 23-24, available at: https://www.unpir.ro/documents/phoenix/pdf/revista-phoenix-65.pdf, date of the last visit 06.11.2018.

[37] *https://www.insol-europe.org/about-us/mission-statement*, date of the last visit 06.11.2018.

[38] *https://www.insol.org/about*, date of the last visit 06.11.2018.

[39] *Strategic review of INSOL International - Taskforce 2021 - https://www.insol.org/news/*, date of the last visit 06.11.2018.

[40] *https://www.insol-europe.org/events/0/start_date/asc/2018*, date of the last visit 06.11.2018.

[41] The previous INSOL Europe congress, held in Warsaw in the same period of 2017, was particularly important for the profession of practitioner in insolvency in Romania, because, on this occasion, Radu Lotrean, associate founder of CITR – Part of the CITR Group –, was appointed President of INSOL Europe, being the first Romanian that heads this organization and the first president of INSOL Europe coming from the Central and Eastern Europe. - See Simona Maria Miloș, Alina Zechiu, *„Sumarul Congresului INSOL Europe, Varșovia, 5-8 actombrie 2017"*, in Journal of the National Union of Insolvency Practitioners in Romania „Phoenix", no. 62/ 2017 – available at *https://www.unpir.ro/documents/phoenix/pdf/revista62.pdf*, date of the last visit 06.11.2018.

4. Designs of the insolvency regime. „Multi-faceted" insolvency in the context of international economic order - US vs. European Union vs China

In a recently published official analysis and research document (8th September, 2018), under the coordination of the OECD Economic Department[42], recent reform efforts have been highlighted in particular for prevention and streamlining, which reforms can be seen in 11 countries, especially in European countries (for example in Portugal), largely due to policies coordinated by the European Commission and the IMF in response to the crisis. Thus, the barriers to restructuring were also reduced in 10 countries, while the reform activity affects the personal costs of failed entrepreneurs was less ambitious, with only Chile, Greece and Spain implementing reforms since 2010. The regimes should be designed in a way that should encourages debtors to take appropriate measures sufficiently early in relation to their financial difficulties, thus increasing the chances of successful restructuring, a series of studies already highlighting best international practices (IMF, 1999; INSOL, 2000, UNCITRAL, 2004, World Bank, 2015), starting from a number of rules such as: a clear trigger that causes debtors to take appropriate measures early enough in their financial difficulties, thus increasing the chances of successful restructuring , the availability of an effective liquidation option and an equitable opportunity rehabilitation services to determine whether or not the value of the firm is maximized by liquidation or restructuring, supporting the rehabilitation of viable firms, applying a mechanism to prevent resistance from a minority of creditors allowing for ignoring their votes in terms of a plan the restructuring by a majority of creditors, the rapid liquidation of non-viable firms and the facilitation of selling the business as a matter of concern. The OECD also draws attention to the importance of differentiating between honest and bad faith entrepreneurs, a distinction that does not exist in many European countries, unlike the United States. Moreover, given that in some countries, the insolvency of legal persons may lead to personal insolvency after the firm becomes insolvent, even if the firm is a separate legal entity, the design of personal insolvency regimes is also important, in the sense that an effective personal insolvency regime should take into account the prospects and incentives of debtors to generate future income in order to allow for a second chance after insolvency for entrepreneurs.

Based on a questionnaire addressed to the countries of reference, under the aegis of OECD, it was outlined that the inefficiencies related to the insolvency exit margin are more pronounced in state economies where insolvency regimes require high personal costs from failed entrepreneurs, lack preventive measures and sufficient streamlining, there are no tools to facilitate restructuring and other features

[42] Adalet McGowan, M. and D. Andrews (2018), *Design of insolvency regimes across countries*, OECD Economics Department Working Papers, no. 1504, OECD Publishing, Paris, available at: https://www.oecd-ilibrary.org/docserver/d44dc56f-en.pdf?Expires=1541671387&id=id&accname=guest&checksum=C905B65C5B393FE0DA4A196726D14AE3, date of the last visit 08.11.2018.

such as the role of the courts, the rights of employees and the treatment of fraudulent activities, which could delay the timely resolution of financial difficulties. Moreover, it is specified that an important compromise in the design of the insolvency is linked, on the one hand, to the incentives it offers to investors to extend credit and monitor the performance of the firm and, on the other hand, to the incentives it offers to debtors for an efficient and transparent management of the firm. Furthermore, on the basis of OECD research policy indicators, established as an important tool for assessing the impact of insolvency regimes on economic performance, it has been highlighted that the reforms to insolvency regimes can Reduce the share of capital sunk in zombie firms, defined as those 10 years or older and with an interest coverage ratio less than one over three consecutive years – which in turn spurs the reallocation of capital to more productive firms, can weak firms by raising the likelihood that zombie firms subsequently return to better financial health and the weakest non-zombie firms avoid turning into zombies, implies lower costs to job churn than if insolvency reforms only raised aggregate productivity via the exit of weak firms.[43]

On the other hand, we still face the bankruptcy stigma that is omnipresent in modern societies, from China, to Europe and the United States. It is highlighted that the bankruptcy stigma is much more intense in China and Europe, especially in Continental Europe, compared to the United States. In general, the intensity of the bankruptcy stigma tends to be lower in the Anglo-Saxon legal systems, which are also among the most advanced economies in the world, we also consider the famous German Schefenacker forum shopping case, many German companies moving their centre of interest (COMI) in England precisely because of a more favourable restructuring climate. Theoretically, while China and Europe are at the highest end of bankruptcy stigma, the main Anglo-Saxon systems are closer to the other, with the United States having the system where the stigma seems to be the lowest but still present, among all developed economies and common law jurisdictions. The European civil law systems, although of varying intensity, should be placed close to the German law, regardless of whether they belong to the Germanic, Romanic, Scandinavian or mixed German tradition. Transitional systems in Central and Eastern Europe (hereinafter CEE) should also be listed as being most similar to German law, with a bankruptcy stigma with a similar intensity to all the influence of US reorganization legislation. Therefore, all common law systems differ significantly from the United States in terms of bankruptcy and insolvency in general. The doctrine suggests a position of English law, or provinces with a common law system in Canada, somewhere between the extremes represented by

[43] Adalet McGowan, M. and D. Andrews (2018), Chapter 3: *Policies for productivity: the design of insolvency regimes across countries*, *op. cit.*, OECD Economics Department Working Papers, No. 1504, available at https://www.oecd.org/eco/growth/policies-for-productivity-the-design-of-insolvency-regimes-across-countries-2018-going-for-growth.pdf, date of the last visit 07.11.2018.

the United States and the German law, although it is undoubtedly closer to the former.[44]

Currently, the United States is the main model of insolvency law in terms of reorganization and restructuring. In fact, the fundamental purpose of the laws of the American state is to provide debtors with a fresh start of business, prioritizing reorganization over bankruptcy, a procedure governing the US insolvency proceedings. The reorganization category under the American Insolvency Code covers town halls and municipalities, corporations and individuals, individual farmers and individuals with regular income, and the reorganization plan becomes a real rescue tool in the sense that, unlike our legislative system, the court has the sovereign power to approve a plan, even in the case of the objections and the negative vote expressed by the creditors, but only if it is convinced that the plan is honest and is drawn up in good faith in identifying a balance of interests between the creditors and the debtor. The absorption of such a measure in our legislation would be auspicious, given the current reluctance and manifestation of the general insolvency procedure despite the efforts to reform the internal legislation. Other law systems, such as those in Australia and New Zealand, have adopted the American model, giving priority to the recovering and reorganization of the debtor in financial difficulty.[45] We should mention that the Chinese law system[46] also promotes reorganization to the detriment of bankruptcy, considering that granting a second chance brings added value to the economic environment, while contributing to social stability and prosperity, the number of jurisdictions, many with developed economies and sophisticated legal systems, turning into a desire to transplant a functional reorganization system, viewing the American law as a model. However, the simple adoption of the written laws of reorganization proves to be insufficient, the interdisciplinary subject of the bankruptcy stigma and its impact on the content and functioning of the insolvency law, especially the impact on restructuring legislation, deserving more attention. Although the stigma cannot be quantified, it subsists with various intensities and in different forms of appearance and clearly affects the implementation of laws in state legal systems, remaining a significant interference factor and applies especially to the orientation towards restructuring, as

[44] See Tibor Tajti, *Bankruptcy stigma and the second chance policy: the impact of bankruptcy stigma on business restructurings in China, Europe and the United States*, published in „China-EU Law J" (2018) 6:1-31.

[45] See Arnd Wiebusch, *Business Rehabilitation. Voluntary Administration in Australia and New Zeeland in comparision to the German Insolvency Plan*, VDM Verlag Dr. Muller Publishing House, 2010 - *https://www.morebooks.de/gb/search?utf8=%E2%9C%93&q= insolvency*, date of the last visit 07.11.2018.

[46] See H. Zhang, *Corporate rescue in Chinese Insolvency Law*, LAP LAMBERT Academic Publishing, 2012 - *https://www.morebooks. de/store/gb/book/corporate-rescue-in-chinese-insolvency-law/isbn/978-3-659-16072-1.*

is currently the case of China, France, Germany and many other Western European countries as well as the vast majority of Central and Western Europe.

5. A new internal revolution of the insolvency law triggered by the entry in force of Government Emergency Ordinance no. 88/2018 amending and supplementing normative acts in the insolvency field and other normative acts. Progress or regress?

At national level, insolvency law has been outlined ascendingly and seems to have revolutionized the legislation in the field, and in recent years a genuine independent law of insolvency has emerged[47], which seeks to unify and consolidate a complex and comprehensive Insolvency Code that embraces a common *corpus*, all legislation on insolvency and general legislation applicable to all economic operators, the special legislation applicable to credit institutions and insurance companies, to groups of companies, as well as rules on cross-border insolvency, to which the tools for the prevention of insolvency, respectively the ad hoc mandate and the agreement with creditors are added, as regulated by Law no. 85/2014, as well as the norms of Law no. 151/2015 on the insolvency of natural persons, respectively the insolvency of the administrative-territorial units, regulated by Government Emergency Ordinance no. 46/2013 and approved by Law no. 35/2016, harmonized at the same time with European norms and international principles. At the boundary between the aspiration to outline a true Insolvency Code and the risk of facing a new fragmentation, given the initiative of the executive to put the foundations of an Economic Code of Romania,[48] a measure already implemented in other EU countries, such as Belgium,[49] as a fusion perspective aimed at including all the laws specific to the economic field[50], especially the Fiscal Code, the Fiscal Procedure Code, the Law on the Establishment of Commercial Companies, the Law on Tax Evasion, both unconverted initiatives so far, the insolvency regime is currently "shaken" by Government Emergency Ordinance no. 88/2018 amending and supplementing normative acts in the field of insolvency and other normative acts, recently published in the Official Journal of Romania no. 840/02 October 2018 and regarded as a legislative reform that gives birth to the uncertainty of creation of a

[47] See Ionel Didea, Diana Maria 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.

[48] http://www.economica.net/guvernul-a-aprobat-un-memorandum-privind-elaborarea-codului-economic-al-romaniei_154445.html, date of the last visit 07.11.2018.

[49] In Belgium, the Code of Economic Law was redimensioned and republished, with the legislator adopting and inserting on July 13, 2017 Bill XX - "Insolvency of Enterprises", which revolutionized insolvency by adopting new measures and extending the scope to liberal professions, category still excluded in our legal system. - See Cedric Alter (coordinateur), Florence George, Michele Gregoire, Zoe Pletinckx, Patrick T'Kint, Ivan Verougstraete, *Le nouveau livre XX du Code de droit economique consacre a l/insolvabilite des entreprises*, Larcier, 2017.

[50] In this situation insolvency risks a new legislative resizing, because an economic law is also Law no. 85/2014 on insolvency and insolvency prevention procedures, but it is understood that the focus of this legislative code is only the category of professional traders.

framework for the evolution or revolutions of the insolvency law, taking into account the new changes that do not seem to fit into the principles and the legislative coordinates outlined and drawn with so much effort in the past years at European Union and global level. Although the stated purpose of this Ordinance is to avoid fraudulent insolvencies, to create *"the premises for viable business recovery and faster recovery of claims, including budgetary ones, in line with both the budgetary interest and the general economic and social one of Romania"* and to implement *"urgent legislative and administrative measures that will lead to the recovery of the companies and their maintenance in the economic circuit, given that at present over 6,000 companies with about 64,000 employees are in insolvency proceedings during the observation period",* only the proof of practice will prove whether these provisions really lead to a real recovery of debtors in financial difficulty, or the business environment is experiencing a more aggressive recovery of budget receivables and a hindrance to the implementation of the judicial reorganization procedure, the companies with debts to they have no access to any insolvency conditions when they have financial problems, and bankruptcy thus becomes inevitable in almost all cases. Finding a balance between private sector receivables and state-owned receivables remains definitely a delicate point in addressing insolvency. According to recent opinions[51] of insolvency experts the new Ordinance affects the very essence of the insolvency procedure, namely the fundamental principles such as competition and unity, by allowing for the enforcement of current debts in the procedure, greatly rebalancing the process of reorganization, anyway in a percentage very low of 5-6%, and contradicting the international practices in the field that recommend avoiding enforcement. According to the new regulation, art. 143, par. (1) shall be amended to read as follows: "... *For debts accumulated during insolvency proceedings which are longer than 60 days, enforcement may be initiated."* It is very important to point out that such a regulation existed in the original draft of the Insolvency Code regulated by Government Emergency Ordinance no. 91/2013 on Insolvency Prevention and Insolvency Proceedings, which expressly provided for in Art. 75 par. 4 and it was precisely the fact that the suspension of law and the enforcement of debts arising after the opening of the insolvency proceedings no longer operate, so that if the debtor did not pay these debts within 90 days from the maturity, the creditor opened the way to enforcement. We mention that following the declaration of the unconstitutionality of Government Emergency Ordinance no. 91/2013 by the decision of the Constitutional Court issued on 29.10.2013, its content was taken over, except the aspects of unconstitutionality, and became, with amendments, adaptations and completions, Law no. 85/2014 on Insolvency Prevention and Insolvency Proceedings, which eliminated the provision that was otherwise considered unconstitutional. The legislator "overpowered" the

[51] Regional Insolvency Conference organized by INPPI and INM on 19 October 2018 2018 - https://www.universuljuridic.ro/inca-avem-o-suma-de-intrebari-si-foarte-putine-raspunsuri/, https://www.universuljuridic.ro/mesajul-pe-care-noi-am-dorit-sa-l-transmitem-in-aceasta-conferinta-este-legat-de-ultimele-modificari-ale-legii-privind-procedura-insolventei-prin-oug-nr-88-2018/, date of the last visit 07.11.2018.

entire legislative construction of recent years that focused on a "rescue culture". It is very difficult to imagine the likelihood of a reorganization while also starting parallel enforcement proceedings initiated by bailiffs, budgetary and fiscal receivers, and insolvency practitioners, all the more so since we also take into account the amendment of art. 5 para. (1) (72), which adds a new condition for the initiation of the proceedings: "*When the application for the opening of insolvency proceedings is introduced by the debtor, the amount of the budgetary receivables must be less than 50% of the declared amount of the debtor's debts"* And which obviously leads to the direct entry into bankruptcy of a larger number of debtors in financial difficulty. Or, in this context, where is progress?

The insolvency procedure is a judicial, collective and concurrent, unitary and general, egalitarian, as well as remedy or, as the case may be, an enforcement[52], the competitive nature ensuring that the individual interest of each creditor complies with the interests of the other creditors, the impossibility of simultaneously subjecting a debtor to more proceedings for collective enforcement governed by the law, from which the equivalence also arises, in accordance with the principle of proportionality, all creditors constituting the body of creditors in order to be compensated at the same time and proportionally, from the amount of the debts held, in the order of priority established by law, regardless of the nature of the claims and the public or private interest represented by the creditors. Therefore, art. 143, para. (1) as amended by the Emergency Ordinance no. 88/2018 comes in contradiction with one of the special and public order effects of opening the insolvency procedure, regulated by art. 75 of the Law no. 85/2014, which aims at suspending and halting both the individual enforcement against the debtor and any in-court or out-of-court actions in the realization of debts initiated by creditors, in fact assuring the premises of conducting a concurrent insolvency proceeding, the compliance with the order of priority of the creditors, as well as the granting of a chance of recovery to the debtor.[53]

However, the initiation of enforcement proceedings during the insolvency proceedings seriously affects the guarantee of a competitive nature, which in turn represents a shield against early and uncoordinated liquidation of the debtor's assets and which benefits not only the debtor but also the creditors who entered - a "sacrifice" game[54], which, through the new regulation, is likely to remain uncompensated for the benefit of the creditors of the current claims demanding the enforcement, and which may even be inferior. Indeed, the possibility of such individual enforcement existed previously in favour of the budgetary creditor, a position established in the Fiscal Code, this conflict of special laws - the Fiscal Code

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[52] See Simona - Maria Miloș, Andreea Deli-Diaconescu, *Principii. Caractere. Scopul și obiectul procedurii insolvenței*, in Radu Bufan (coord.), *Tratat practic de insolvență*, Hamangiu Publishing House, Bucharest, 2014, pp. 85-91.

[53] See Gheorghe Piperea (coord.), Cătălin Antonache, Alexandru Dimitriu, Irina Sorescu, Alexandru Rățoi-Pârvu, Rebeca Dan, Luiza Hagiu, *Codul insolvenței. Note. Corelații. Explicații*, C.H.Beck Publishing House, Bucharest, 2017, pp. 457-458.

[54] Gheorghe Piperea, *Caracterele sacrificial, colectiv, concursual și necesar* in *procedura insolvenței*, „Curierul Judiciar" no. 7/2017, p. 398.

versus the Insolvency Code, being somewhat attenuated by the private creditor test that allows the budgetary creditor to determine whether it can obtain more from the debtor through insolvency or reorganization proceedings than through individual enforcement or bankruptcy, thus granting exemptions, rescheduling payments and partial debt repayments.[55]. In this respect we can say that the Government Emergency Ordinance brings improvements, introducing into art. 133, after paragraph (5), three new paragraphs, which establish transparent criteria for reducing the budgetary claim not guaranteed by the reorganization plan. We believe that it is more advantageous for public creditors to support and accept the procedure for the reorganization of debtors in difficulty to the detriment of bankruptcy, the latter ultimately involving a low recovery taking into account the priority of guarantees in recovering the sums, while we can no longer talk about the recovery of current receivables.

In a report drafted by the World Bank Group and published in May 2018[56], it was also pointed out that there are many factors influencing the duration of solving insolvencies in Romania, measures in this field being taken to support the financial institutions, the IFC co-investing together with the main national investors in five non-performing loan portfolios sold by three major banking groups in Romania, and on December 31, 2017, approximately 16,500 non-performing loans were settled under IFC-supported projects, helping the over-indebted consumer and debtor SMEs in Romania to free themselves from debt and re-enter the financial system. Nevertheless, the World Bank reports that the insolvency law reforms are needed to increase transparency and clarity in case processing, the first bases in this regard being already made by drawing up the first National Insolvency Code in line with European standards, the number of cases falling due to the introduction a new minimum threshold of RON 40,000, as well as the streamlining of the liquidation of the assets. However, the report highlights that the progress made in education, insolvency and climate change has not achieved adequate results for the integration objectives of Europe 2020 Strategy.

6. Conclusions

In the context of a global economy and of the change in the prospects of the insolvency regime, global concerns outlining a "rescue culture"[57] by recognizing that financial waves in the era of globalization can even hinder enterprises that are fundamentally healthy, we consider it expedient to exchange real experiences of

[55] Radu Bufan, Gabriela Carmen Sanda, *Regimul fiscal al insolvenței*, in Radu Bufan (coord.), *op.cit*., pp. 1032-1035.

[56] Report no. 126154-RO, „International Bank for Reconstruction and Development and International Finance Corporation and multilateral investment guarantee agency country partnership framework for Romania", available at http://documents.worldbank.org/ curated/en/954721529638270108/pdf/ Romania-CPF-May-21-05252018.pdf, date of the last visit 08.11.2018.

[57] Westbrook, „*Globalisation of Insolvency Reform*", p. 403, *apud* Vanessa Finch, *Corporate insolvency law. Perspectives and principles*, second edition, Cambrige University Press, Cambridge, UK, 2009, p. 253.

success identified in other countries. We also underline the importance of eliminating the current differences in the legal systems of the Member States in relation to the insolvency proceedings, as determined by the many links between the insolvency law and the related areas of national law, such as tax law, labour law and social security law, the European Commission, stating that despite the insolvency reforms, the rules are still divergent and remain inefficient in some countries. Thus, in several Member States, it is not possible to restructure an enterprise before it becomes insolvent, while in relation to the second chance, there are important differences in the length of the debt discharge period, resulting in legal uncertainty, the generation of additional costs for investors in assessing their risks, less developed capital markets and the persistence of barriers to the effective restructuring of viable companies in the European Union, including cross-border business groups. According to the World Bank indicators, the recovery rates in the EU are between 30% in Croatia and Romania and 90% 4 in Belgium and Finland, with the indication that the recovery rates are higher in economies where restructuring is the more common insolvency procedure. In these economies, creditors can expect, on average, to recover 83% of their claims, compared with an average of 57% in the liquidation procedure.[58]

The direction we choose to impose on the insolvency regime, namely the reorganization or bankruptcy, relies on social and economic consequences such as keeping jobs, worsening or not the level of bad loans in the economy, the need to implement effective remedies to rebalance economic shocks, consequences that need to be mitigated, while respecting the principle of balance and proportionality in a complex case, such as insolvency.

Bibliography

Adalet McGowan, M. and D. Andrews (2018), *Design of insolvency regimes across countries*, OECD Economics Department Working Papers, No. 1504, OECD Publishing, Paris, available at: https://www.oecd-ilibrary.org/ docserver/d44dc56f-en.pdf?expires=1541671387&id=id&accname=guest&checksum=C905B65C5B393FE0 DA4A196726D14AE3

Adrian Năstase, Ion Gâlea, *Dreptul internațional economic*, C.H.Beck Publishing House, Bucharest, 2014.

Arnd Wiebusch, *Business Rehabilitation. Voluntary Administration in Australia and New Zeeland in comparision to the German Insolvency Plan*, VDM Verlag Dr. Muller Publishing House, 2010.

Cedric Alter (coord.), Florence George, Michele Gregoire, Zoe Pletinckx, Patrick T'Kint, Ivan Verougstraete, *Le nouveau livre XX du Code de droit economique consacre a l'insolvabilite des entreprises*, Larcier, 2017.

Cristina-Elena Popa Tache, *Introducere in dreptul internațional al investițiilor,* Universul Juridic Publishing House, Bucharest, 2018.

Dan Drosu Șaguna, Daniela Iuliana Radu, *Politica de Coeziune a Uniunii Europene. Strategia Europa 2020*, C.H. Beck Publishing House, Bucharest, 2016.

[58] Index „Doing Business" of the World bank for 2016.

Emilian M. Dobrescu, *Europenizare 2017 și primele 6 luni din 2018*, „Tribuna Economică" no. 30/2018.

Gheorghe Bocșan, *Armonizarea, apropierea legislațiilor și stabilirea de standarde minime in dreptul Uniunii Europene*, „Dreptul" no. 7/2018.

Gheorghe Piperea (coord.), Cătălin Antonache, Alexandru Dimitriu, Irina Sorescu, Alexandru Rățoi-Pârvu, Rebeca Dan, Luiza Hagiu, *Codul insolvenței. Note. Corelații. Explicații*, C.H.Beck Publishing House, Bucharest, 2017.

Gheorghe Piperea, *Caracterele sacrificial, colectiv, concursual și necesar in procedura insolvenței*, „Curierul Judiciar" no. 7/2017.

H. Zhang, *Corporate rescue in Chinese Insolvency Law*, LAP LAMBERT Academic Publishing, 2012.

Ionel Didea, Diana Maria Ilie, Roxana Denisa Vidican, *The interdisciplinarity of the scientific research of law. The insolvency - an integrative area configured and resized by the intersection of the legal, economic and social realities*, „Agora International Journal of Juridical Sciences", no. 2/2017.

Ionel Didea, Diana Maria 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.

Iulia Monica Oehler-Șincai, *Trei summit-uri importante din perspectiva Noii ordini economice internaționale*, in „Tribuna Economică", no. 36/2018.

Lorena Duduială Popescu, *Locul și rolul UE in spațiul global,* „Tribuna Economică" no. 32/2018.

Marcela Comșa, *Regulamentul privind procedurile de insolvență, Jurisprudența Curții de Justiție a Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2017.

Mirela Iovu, *Efectele implementării Recomandării Comisiei Europene no. 135/2014 privind o nouă abordare a eșecului in afaceri și a insolvenței*, in „Revista Română de Drept al Afacerilor" no. 4/2015.

Radu Bufan, Gabriela Carmen Sanda, *Regimul fiscal al insolvenței*, in Radu Bufan (coord.), *Tratat practic de insolvență*, Hamangiu Publishing House, Bucharest, 2014.

Simona - Maria Miloș, Andreea Deli-Diaconescu, *Principii. Caractere. Scopul și obiectul procedurii insolvenței*, in Radu Bufan (coord.), *Tratat practic de insolvență*, Hamangiu Publishing House, Bucharest, 2014.

Simona Maria Miloș, Alina Zechiu, *Sumarul Congresului INSOL Europe, Varșovia, 5-8 actombrie 2017*, in Journal of the National Union of Insolvency Practitioners in Romania „Phoenix", no. 62/ 2017.

Simona-Maria Miloș, *Prevenția insolvenței prin mijloace contractuale*, „Curierul Judiciar" no. 6/2013.

Tibor Tajti, *Bankruptcy stigma and the second chance policy: the impact of bankruptcy stigma on business restructurings in China, Europe and the United States*, „China-EU Law J" (2018) 6:1–31.

Vanessa Finch, *Corporate insolvency law. Perspectives and principles*, second edition, Cambridge University Press, Cambridge, UK, 2009.

Vasile Godâncă Herlea, *Legea no. 85/2014, un drum către maturitate*, in Journal of the National Union of Insolvency Practitioners in Romania „*Phoenix"*, no. 65/2018.