THEORETICAL AND PRACTICAL ASPECTS ON INSOLVENCY LITIGATION WITH CROSS-BORDER ELEMENTS IN THE REPUBLIC OF MOLDOVA AND IN OTHER COUNTRIES

Bancu Cristina,
Master of law, university lecturer,
State University of Moldova,
Lawyer, BAA Popa & Associates.

This article will provide an overview of the cross-border insolvency, a subject that has been paid increasing attention lately due to cross border trade and investment. It will identify the legal aspects of the cross-border insolvency and their loops in implementation of the cross-border insolvency. Additionally, it will present an updated view regarding the best legislation practices in the field of insolvency in other countries such as USA, Greece, UK, a.o.

A specific feature of the third millennium is the globalisation of trade, which has extended beyond the country's borders and has penetrated, under the standard of profit maximization, those markets where the demand for production and values is remunerative. With the expansion of investment and international trade, both national and international legislation adjust to the new requirements and real situations, thus, a new global approach to insolvency regulations being necessary. The free movement of people and goods all over the world and the economic activities carried out on the territory of many countries result in plenty of legal relationships that emerge within these international relations.

At present, the conflicts of jurisdiction are of special importance because every country is free to establish on its own its international jurisdiction – a freedom that is restricted only by international agreements or conventions.[1]

A civil lawsuit with cross-border elements is resolved as follows:

[1] Ungureanu O., Jugastru C., Circa A., "Textbook of Private International Law", Publishing House Hamangiu, Bucureşti 2008, p. 235.

1. The court that has the jurisdiction to settle the dispute is identified (jurisdiction in private international law).
2. The applicable procedural law is determined and afterwards the conflict of laws is resolved (the procedural law applicable to the legal relationship subject to the lawsuit is determined).[2]

In this study, we will attempt to highlight the regulations on cross-border insolvency and the national regulations, and we will propose *lex ferenda*.

Several theories on insolvency are formulated, namely the theory of universality and the theory of plurality and territoriality.

The majority of legislations accepts the theory of universality (unity) of insolvency (bankruptcy). The competent court located at the debtor's place of residence/ headquarters has exclusive jurisdiction to declare their insolvency (bankruptcy), insolvency (bankruptcy) which refers to all the debtor's assets and produces extraterritorial effect (universal character).

The theory of insolvency plurality and territoriality (bankruptcy) claims that a trader may be bankrupt in all the countries in which the trader has a secondary establishment, a branch or even some items of patrimony. This procedure is governed by the law of the court seized (*lex fori*), which is applied territorially. As a result, every insolvency (bankruptcy) is subject to local laws and is applied territorially in the country where the decision to open the proceedings was made. The effects of insolvency (bankruptcy) are limited to the patrimony fraction located on the territory of the State in which it was declared.[3]

In the Republic of Moldova, the institution of insolvency has undergone a diverse development[4], being influenced by the international acts, but especially by national judicial practice. Since the Republic of Moldova declared its independence, there have been four laws which regulate insolvency: Law no. 851/1992 on Bankruptcy, Law No. 786/1996 on Bankruptcy,Law on Insolvency no. 632/2001 and Law on Insolvency no. 149/2012.

---

[2] Filipescu I. P., Filipescu A. I., "Treaty on Private International Law "revised and enlarged edition, Publishing House Universul Juridic, Bucureşti 2005, p. 422;

[3] Dobre A., The Evolution of International Insolvency Regulation https://www.juridice.ro/166356/evolutia-reglementarii-insolventei-pe-plan international.html (accessed 10.04.2018).

[4] Insolvency Law from Theory to Practice (conference support material) on the occasion of the 55th anniversary of the foundation of the Faculty of Law of the State University of Moldova, 10.10.2014 Chişinău. http://drept.usm.md/public/files/brosura-b6-1-6-final130e7.pdf (accessed 01.04.2018).

The notion of cross-border insolvency is found in art. 252 of Law on Insolvency no. 149/2012[5] as follows:

”Cross-border insolvency – if insolvency proceedings have been opened in another State against a debtor who has assets on the territory of the Republic of Moldova, the execution of their assets may be initiated only on condition that there is a bilateral agreement between this State and the Republic of Moldova on cross-border insolvency.”

The same notion is found in art. 225 of Law on Insolvency no. 632/2001*(abrogated)*. Among the peculiarities of insolvency, we point out the following: upon receiving the introductory application, the law requires that the court should apply ... the necessary measures to prevent the change of the State of the debtor's assets during the period before the insolvency proceedings were initiated[6]. Under art. 277 par. 1) letter (a) Civil Code of the Republic of Moldova all proceedings for individual prosecution of creditors, as well as enforcement proceedings are suspended, and on this occasion the limitation period is interrupted.

The issue of cross-border insolvency is a complex one as it involves debtor's assets being on both the territory of the Republic of Moldova and beyond its borders. Another reason mentioned by author Sergiu Popovici would be the cross-border elements of insolvency of enterprises that perform “business activities with cross-border effects that would be likely to affect the proper functioning of the internal market”[7].

In the same context, the author mentions that after initiating the insolvency proceedings, forced enforcement can no longer be carried out against either the debtor or their debtors. As an exception, the following proceedings are accepted: the debtor can only recover their debt only with the approval or under the supervision of the judicial administrator or the liquidator, and the execution may be only collective against the debtor’s property, the distribution of the debtor's property either among their creditors or its reorganization with the purpose of covering the debts being the insolvency proceedings.

---

[5] Law on Insolvency no. 149 of 29.06.2012, art. 252.

[6] Nicu I., Nicu C., Cross-border Insolvency as lex ferenda Proposal for the Legal System of the Republic of Moldova, 2016, www.dreptmd.wordpress.com (accessed 15.04.2018).

[7] Sergiu Popovici, Cross-border Insolvency: Framework and Restriction for Cross-border Enforcement: http://www.universuljuridic.ro/insolventa-transfrontaliera-cadru-si-limita-pentru-executarea-silita-transfrontaliera/(accessed: 25.03.2018).

The Explanatory Decision of the Plenum of the Supreme Court of Justice of the Republic of Moldova on the judicial practice of examination of civil cases with cross-border elements no. 3 of 25.04.2016 stipulates in paragraph 65 that the proceedings with cross-border elements which are to be examined in the contentious procedure or, as the case may be, in the administrative contentious procedure are the exclusive jurisdiction of the courts of the Republic of Moldova, in which:

letter. g) stipulates: the proceedings have the purpose to declare insolvency or any other court proceedings on the cessation of payments in the case of a foreign trade company based in the Republic of Moldova.

Further, we will report on the international experience in cross-border insolvency, which, unlike that of the Republic of Moldova, is richer and explains in detail the formality of both recognition of main insolvency proceedings and secondary proceedings as well as the recognition and effects of the foreign insolvency proceedings.

The cross-border insolvency is widely regulated at the international level. Thus, the following international acts may be enumerated:

- The Montevideo Treaties of 1889 and 1940 (the Montevideo Treaty of 1889 governs the liquidation of the debtor's property, which is in the cessation of payments, the court at the debtor's place of residence having the jurisdiction over settlement. In both Treaties signed at Montevideo, the bankruptcy administrator has authority in all contracting States, and the creditors of the foreign debtor may initiate insolvency proceedings in their own State against the debtor's property in the territory of that State. As a result, the court of any of the States in whose territory the debtor has property has jurisdiction);
- The Havana Convention of 1928 - also known as the Bustamante Code (establishes that the debtor's civil or commercial domicile is the jurisdictional criterion for initiating bankruptcy proceedings[8], the recognition of judgments on the reorganization and liquidation of the debtor's property, the powers of the

[8] Under to art. 414 of the Havana Convention of 1928 “if the insolvent or bankrupt person has only a civil or commercial domicile, there can be only one insolvency, bankruptcy proceeding, a single payment suspension or a single arrangement for the entire asset and its liabilities in the Contracting States.”
Under art. 415 of the Havana Convention of 1928, if, on the contrary,” a person or a company has, in more than one of the various contracting States, a completely separate commercial establishment from an economic point of view, there may be as many bankruptcy proceedings as commercial establishments”.

administrator appointed by the competent court and decisions on the abolition or modification of patrimonial transfers during the suspect period, with prejudice to the creditors);

- The Model Law developed by the Bar International Association on cross-border insolvency cooperation (Model International Insolvency cooperation Act – MIICA MIICA - a document proposing the application of the universality theory to bankruptcy and the administration of the legal procedure and the debtor's assets under a single jurisdiction, regardless of the States in which these assets are situated. The same act also provides for judicial assistance to be given to the insolvency administrator);
- The Istanbul Convention on Certain International Aspects of Bankruptcy from 1990, ratified by seven countries: France, Germany, Italy, Luxembourg, Greece, Turkey and Cyprus (provides for the opening of bankruptcy proceedings as belonging to the court of first instance from the principle of the registered office (the debtor's centre of interest (Article 4[9]). This is a presumption of *juris tantum*, being liable until the contrary is proved, as it were the case when the decisions made in another place are proven. The law also provides for the powers of the syndic, the secondary bankruptcy being governed by the law of the State in which it was opened. The proceeding for notifying creditors who are in foreign States is also regulated as being an individual one, where each creditor must be informed separately);
- The Brussels Convention of 23 November 1995 on Insolvency Proceedings;
- Council Regulation no. 1346/2000 of 29 May 2000 on insolvency proceedings (including 47 articles, which apply to the EU Member States with the exception of Denmark, which did not take part in the adoption of the Regulation. The main purpose of the Regulation is to establish an area of freedom, security and justice, for

[9] Article 4, paragraph 2, of the 1990 Istanbul Convention establishes the competence of jurisdiction or authority of a State party to the Convention where the debtor has an establishment (a registered office) in two cases:
- the first case is where the debtor has no centre of main interests in the territory of a Contracting State, but has an establishment in the territory of such a State.
- the second case is of a different nature because it depends on the legal system of the Contracting State in which the debtor has the centre of the main interests. If, according to the legal system of this state, the bankruptcy of the debtor cannot be declared in terms of its quality (trader, small entrepreneur, artisan, farmer, etc.), the jurisdiction or authority of the State party to the Convention where the debtor has an establishment becomes competent.

the proper functioning of the internal market and for cross-border insolvency proceedings to function effectively and efficiently. The Regulation applies to proceedings initiated after its adoption). The author Comşa M. described in detail the main and secondary insolvency proceedings governed by the Council Regulation no. 1346/2000. Thus, art. 3 of the Regulation provides that courts of the Member State within the territory of which the centre of a debtor's main interests is situated have jurisdiction to open insolvency proceedings. Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State have jurisdiction to open insolvency proceedings against that debtor only if they have an establishment within the territory of that other Member State. If the proceedings have been opened according to the first plea in law, any proceedings opened subsequently are considered secondary (ex. The second plea). The particular insolvency proceedings – particular proceedings in another member State may be opened prior to the opening or even in the absence of main insolvency proceedings, if the debtor has a secondary establishment in that State ((branch, agency, office). If the centre of the debtor's main interests is situated within the territory of a Member State , the courts of another Member State have the jurisdiction to open insolvency proceedings against that debtor, only if their establishment is situated within the territory of the latter State[10];

In 1997, on May 30, the UNCITRAL Model Law on Cross - Border Insolvency (UNCITRAL Model Law on Insolvency[11]) was passed. The Act is designed to provide a model framework that encourages the co-ordination and co-operation between jurisdictions. This law defines cross-border insolvency, as one in which the insolvent debtor has assets in several countries or where some of the debtor's creditors are not from the States where the insolvency proceedings started. Despite previous proposals in this regard, it does not attempt to unify the substantive national Law on Insolvencies. The UNCITRAL law on cross-border insolvency respects the differences among the substantive and procedural laws of the States.

The UNCITRAL Law on Cross-Border Insolvency has the following *objectives*:

[10] Comșa M., Resolving Insolvency Situations with Cross-border Elements in Romania. Relations with the Other Member States of the European Union - EC Regulation nr. 1346/2000.
[11] UNCITRAL Model Law on cross-border insolvency on 30 May 1997. Retrieved 7 June 2015.

a) cooperation between the courts and the competent authorities of that State and of the foreign States involved in cross-border insolvency cases;

b) a safer environment for investment and trade;

c) the correct and effective administration of cross-border insolvency which protects the interests of all creditors and other interested parties, including the debtor;

d) protecting and maximizing the value of the debtor's assets; and

e) facilitating the rescue of businesses with financial problems, thus protecting investment and preserving employment.

In order to ensure the harmonization of the Model Law, the Secretary of the United Nations Commission on International Trade Law (UNCITRAL) regularly publishes a summary of judicial decisions interpreting conventions and laws, which may be consulted by anyone interested. Under art. 5 of the UNCITRAL model law, the representative of the State which passes the model law is authorized to act in a foreign State as a representative of the proceeding opened in the first State under the conditions established by the applicable foreign law.

Insolvency is of different procedural forms, although everywhere in the world it refers to the same substantive issue, namely the debtor's entry into the cessation of payments procedure. For example, according to the *Uniform Commercial Code*, a *solvency proceeding* is provided in the United States, stating the assignment of debts to the benefit of the creditors, as well as any procedure that is intended to liquidate the patrimony or clarify the situation of the person concerned.

In the British legal system (*common-law* system), there are regulations that refer to insolvency in the *Insolvency Act* of 1986, providing for a simplified procedure in which bankers who are not paid can take over, without formalities and delay, all the assets of their debtor and can sell them.

In the German law system, insolvency is governed by the *Commercial Code*, and in the French judicial system the judicial recovery and liquidation procedure is applied, which has taken into account largely the latest developments in this field.

In Greece, there is a specialized institution created for the management of companies encountering difficulty, which draws up a recovery plan with the creditors and, as a last resort, they have recourse to the judicial liquidation procedure, which is started only in the case of the failure of the preliminary measures and the attempts to recover.

In Belgium, there is the institution of preventive arrangement with creditors, which can be used and opened before the proper procedure and in which creditors play a major role. Only in the case where the preventive arrangement with creditors procedure fails, the insolvency proceeding is started[12].

With regard to insolvency proceedings, the European Court of Justice interpreted it as follows:

With the opening of insolvency proceedings, a "framework for all forced executions, including cross-border enforcement" is also formed. The opinion of the European Court of Justice is quite interesting, which also defines the phrase *decision by which the proceeding was opened.* According to it, this phrase must be analysed on the ground that it "iincludes not only that decision formally described by national law as such, but also those judgments given following an application which, by invoking the debtor's insolvency, have the purpose of initiating proceedings and that judgment leads to the divestment of the debtor and the appointment of a liquidator. The divestment of the debtor entails the denial of the right of administration over their assets. The fact that the liquidator has been appointed on a provisional basis does not affect the qualification of the judgment as the judgment by which the proceedings were opened".

Given the multitude of legal relationships that arise from international legal relationships, declaring a natural or legal person as incapable of payment and opening an insolvency proceeding may produce effects not only in a State but in two or more countries, depending on the cross-border elements contained in the incidental legal relationships.

As a result of the analysis, we have identified a number of issues related to the establishment of the jurisdiction, the determination of the applicable procedural law, the determination of the substantive law (resolution of the conflict of laws) and, last but not least, the effects of a judgment given in another State and the execution of the foreign judgment.

As *lex ferenda*, we suggest returning to the content of art. 252 of the Law on Insolvency, and expanding by explaining in detail the institution of cross-border insolvency, namely including the notion of main and secondary insolvency, explaining in detail the role of the administrator and including the particular insolvency procedure.

---

[12] Dobre A., The Evolution of International Insolvency Regulation https://www.juridice.ro/166356/evolutia-reglementarii-insolventei-pe-plan international. html (accessed 10.04.2018)).

Bibliography:

1. Comșa M., Resolving Insolvency Situations with Cross-border Elements in Romania. Relations with the Other Member States of the European Union - EC Regulation nr. 1346/2000.
2. Dobre A., The Evolution of International Insolvency Regulation https://www.juridice.ro/166356/evolutia-reglementarii-insolventei-pe-plan international.html (accessed 10.04.2018).
3. Filipescu I. P., Filipescu A. I., "Treaty on Private International Law "revised and enlarged edition, Publishing House Universul Juridic, Bucureşti 2005, p. 422;
4. Nicu I., Nicu C., Cross-border Insolvency as *lex ferenda* Proposal for the Legal System of the Republic of Moldova, 2016, www.dreptmd.wordpress.com (accessed 15.04.2018).
5. Popovici S., Cross-border Insolvency: Framework and Restriction for Cross-border Enforcement: http://www.universuljuridic.ro/insolventa-transfrontaliera-cadru-si-limita-pentru-executarea-silita-transfrontaliera/(accessed: 25.03.2018).
6. Ungureanu O., Jugastru C., Circa A., "Textbook of Private International Law", Publishing House Hamangiu, Bucureşti 2008, p. 235.
7. The Brussels Convention of 23 November 1995 on Insolvency Proceedings.
8. The 1990 Istanbul Convention, art.4 par. 2.
9. European Court of Justice, Case C-341/04, Eurofood, par. 54, 55 and 58.
10. The Explanatory Decision of the Plenum of the Supreme Court of Justice of the Republic of Moldova on the judicial practice of examination of civil cases with cross-border elements no. 3 of 25.04.2016
11. Law on Insolvency nr. 149 of 29.06.2012, art. 252.
12. Insolvency Law from Theory to Practice (conference support material) on the 55th anniversary of the foundation of the Faculty of Law of the State University of Moldova, 10.10.2014 Chişinău. http://drept.usm.md/public/files/brosura-b6-1-6-final130e7.pdf (accessed 01.04.2018).
13. Council Regulation no. 1346/2000 of 29 May 2000 on Insolvency Proceedings.
14. UNCITRAL Model Law on Cross-Border Insolvency on 30 May 1997. Retrieved 7 June 2015.

15. UNCITRAL Model law on Cross – Border Insolvency.