

## INSOLVENCY IN THE CONTEXT OF THE PRESENT FINANCIAL CRISES – A COMPARATIVE ANALYSES

Luminița Tuleașcă\*

### Abstract

*This paper presents the current trends in the view of various national states and their impact on the application of collective insolvency proceedings, also called bankruptcy procedure in common language, by analysing their main pieces of legal regulation, extremely useful both for specialists as well as for creditors and debtors.*

*The fact is that thanks to this procedure, businesses which are in a state of financial crisis, either actual or upcoming can be placed under court protection from creditors which results in blocking enforcement and increasing interest and penalties, allowing them a new start through a reorganization of their activities.*

*Reorganizing the activities of insolvent debtors activity may also be in the interest of creditors, if they cannot obtain sufficient repayment through the debtor's bankruptcy. Thus, requests to open insolvency proceedings by them will appear as a means to preserve their rights and to avoid irreversible deterioration of the situation of the debtor.*

*On the other hand, an aggressive insolvency procedure may be used by creditors as a means of pressure in order to obtain a quick settlement of their receivables from solvent borrowers acting in a state of panic created by the existence of an application to open a bankruptcy procedure.*

*And not least, the paper presents how the situation has seriously deteriorated regarding the criteria allowing businesses to apply for an insolvency procedure and the proper use of the benefits of this procedure.*

**Keywords:** bankruptcy, crises, insolvency, insolvability

**JEL Classification:** K12, K22, K40

### 1. Insolvency – a crash in corporations life

We are in full financial and economical crises, which affects the number of bankruptcy agents. The informations provided by the National Trade Register Office and National Union of Insolvency Practitioners, give us the right numbers to understand until where the insolvency cases reached: in the first semester of 2009, the number of cases is around 5000 going up with 50% compared with the first semester of 2008. In the first half of 2009, the cases went up with 70% reaching the number of 12.500, and is appreciating that the number will reach 20.000 by the end of this year.

From the juridical point of view, there is a relevant similarity between natural person and juridical person/corporations in terms of succes or failure activity. Both

---

\* Luminița Tuleașcă is Assistant Professor of Law at the Romanian American University in Bucharest.  
E-mail: [luminita.tuleasca@profesor.rau.ro](mailto:luminita.tuleasca@profesor.rau.ro)

types of people, can badly fail in managing their financial aspects, so bad, that to not be able any more to face its debts and to be in insolvency or bankruptcy.

The insolvency managing can be different from a individual to a legal entities, depending on what concept they adopt for them personal law (lex patrie or lex societates), opting in generally for a special procedure, only in professional commercial cases of failure activities.

The present trend, is to apply insolvency procedure- called, collective procedure on managing the heritage of insolvent persons- whether the insolvent debtor is natural person, legal, trader or private person.

The heritage management of a insolvent person inside of a collective procedure, by objective and professional people, is the only option that the borrower has in order to find solutions for his recovery. This solution has an old tradition in our country, introduced by Calimah Code in 1817, „Civil/Policy Condor of Moldavia Principality”, where, in the annex regarding „Randuiala concursului creditorilor” is regulating the bankruptcy.

The solution mentioned above, was refunded in „Condica comericiu” from 1840, then in The Commercial Code from 1887, and then taken over „modern” legislation in Law 85/5.0f April 2006 regarding insolvency.

In our country, the collective procedure is applied only against debtors that doesn't have sufficient funds to pay the exigible debts in money<sup>1</sup>, strictly to those that are in insolvency or impending insolvency. From this perspective, the insolvency state is a merits/substance condition of applying collective insolvency proceedings<sup>2</sup>.

An apparent exception to the rule is contained in European legal regulation of cross-border insolvency, from European Regulation 1346/ 29 May 2009 regarding insolvency proceedings.

Based on regulation above, the decision to open a main insolvency procedure issued in another state member of UE, has effects on the Romanian debtor if this possess in his country properties, creditors or an office; this gives the right to open a secondary insolvency procedure, without the debtor to be in insolvency. This situation is not an exception to the rule, giving the fact that the organic status of the debtor is not governed by the Romanian law.

The true exceptions, of the debtor's condition insolvency rule required for the insolvency opening procedures are stipulated in special laws, which are regulating the bankruptcy of credit institutions and insurance companies.

---

(<sup>1</sup>) Stanciu D.Carpenu, Drept Comercial Roman, Editia a VIII a , Ed.All Beck, Bucuresti, 2004, p.583-588 ; Ion Turcu, Falimentul –Noua Procedura- Tratat, Ed.Lumina Lex, Bucuresti, 2003, p.193; G.Ripert/Roblot, Philippe Delebeque/Michel Germain, Traite de Droit Commercial, Tome 2, 16 e edition, L.G.D.J., Paris, 2000, nr.2846, p.836; Yves Guyon, Droit des Affaires, Tome 2 Entreprises en difficultes, Redressement Judiciaire-Faillite, 7e edition, Economica, Paris, 1999, nr.1114, p.132 si autorii acolo citati: Delesalle, Reflexion sur le fait generateur de l'ouverture des procedures collectives, these, Paris I, 1983 s.a.; Cas.III, Dec.nr.175/19 mai 1914, C.Ap. Bucuresti, I, dec.124/21 iunie 1933 in Codul Comercial Annotat, Editura Tribuna Craiova, 1994, p.428;

(<sup>2</sup>) G.Ripert/Roblot, Philippe Delebeque/Michel Germain, op.cit.p.836; Yves Guyon, op.cit., p.109 ;

## 2. Insolvency and insolvability

In a new context regarding collective procedure legislation, is a necessary need for a comparative analysis about these two notions that open the causes of collective procedures<sup>3</sup>: insolvency and insolvability.

Clarification of these two notions (that hypothetical or practical can be incidents), is a must especially in those regulations cases, where only the debtor insolvency is drawing the opening collective procedure.

The distinction, in our country, between insolvency and debtor insolvability<sup>4</sup> has been made uniform, therefore, both, doctrine and jurisprudence found this as the only cause of the bankruptcy: insolvency or cessation of payments with the categorical exclusion of the debtor insolvability.

„Failure to pay at maturity reflects the trader insolvency. It is distinguished from insolvability, which expresses the financial imbalance of the trader patrimony, characterized by the mainly liabilities over asset.”<sup>5</sup>

„In case of insolvability, the totality of debtor assets are not sufficient to pay all the creditors.”<sup>6</sup>

„Insolvency distinguished from debtor insolvability: while the insolvency is that debtor state which expresses his incapacity to pay the debts at the maturity from missing liquidities, insolvability is a state of financial imbalance of debtor patrimony, where the value of liabilities is bigger than the assets. The judicial reorganization procedure and bankruptcy, occurs in all cases where the debtor is in insolvency, without taking in consideration the ratio between the liabilities and assets of debtor's patrimony.”<sup>7</sup>

„Relevance on judicial reorganization procedure and bankruptcy, has commercial insolvency, because the ratio of patrimonial assets and liabilities cannot be invoked and opposite to the creditor”<sup>8</sup>.

„Regarding bankruptcy, is taken in consideration the cease of payments, and not the solvency or the insolvency, meaning the ration of liabilities and debtors assets, because there can be cases where it can be declared bankruptcy even if assets surpass the liabilities”<sup>9</sup>.

---

(<sup>3</sup>) Mihail Pascanu, Dreptul falimentar roman, Ed.Cugetarea, Bucuresti, 1927, p.13; Mircea N.Costin, Angela Miff, *„Institutiile juridice a falimentului evolutie si actualitate”*, Revista de drept comercial, nr.3/1996, p.47;

(<sup>4</sup>) Hans van Houtte, International Insolvency and bankruptcy law, The law of international trade, Sweet and Maxwell London, 1995, 10.20,

(<sup>5</sup>) Ion Turcu, op.cit.p.13;

(<sup>6</sup>) Yves Guyon, op.cit., nr.1116, p.133;

(<sup>7</sup>) Stanciu D. Carpenaru, Drept Comercial Roman, Edition 5, Editura All Beck, 2004, p.586;

(<sup>8</sup>) Appeal Court of Bucharest, commercial court, Decision no.131/1999, Culegere de practica judiciara in materie comerciala –1999, p.206-208;

(<sup>9</sup>) Tribunalul Ilfov I, com., 30.07. 1924, Jurisprudenta Generala 1925, p.813;

„The suspension of payments is nothing else than the payments of some exigible debts. Whether the liability is bigger or less than assets, the trader insolvency doesn't involve through her self the effective cease of payments.”<sup>10</sup>

„Insolvency to not be confused with commercial insolvency(...). While the insolvency means liabilities over assets ( $L > A$ ), commercial insolvency puts the trader in the situation of not being able any more to pay his debts with liquidity (cash), indifferent of the ratio between assets and liabilities.”<sup>11</sup>

„Also, may be declared bankrupt, tradesmen that are perfectly solvent, if they are in cease of payments.”<sup>12</sup>

Debtor's insolvency as a cause of collective application procedure is a criterion supported by just a few legislations, primarily because of the latest opening procedure in a situation where the debtor cannot recover, followed by the fact that from the beginning is no way to please the creditors and all their claims.

Under Law 85/2006, the cause of insolvency collective procedure application is insolvency.

The debtor's creditors are not interested in how the liabilities and the assets patrimon's debtor is, but only about if the payments of debts are made or not at the maturity.

The simplified procedure (bankruptcy procedure it self) is applied also for the insolvency cases, not only for the debtors insolvency, situation regulated by art. 1, paragraph, letter c, pt. 1 of Law 85/2006<sup>13</sup>, respectively to the commerciants, legal entities, that do not own any goods in their patrimony/heritage.

We believe that, by applying the simplified procedure, the debtor insolvency it will become subsequent to debtor insolvency, this being a criterion of choosing the procedure form of application.

### 3. Causes of the opening collective procedure – a comparative law analyse

At world-wide and european level, the particularities of casues of the opening collective procedures, are not in the natural state to bring at the light significant differences about this essential aspect – the bankruptcy application procedure.

**3.1. In France**, it is used the notion of „payments suspension”(cessation des paiements) as a main cause<sup>14</sup> of recovery and judicial liquidation application procedure<sup>15</sup>.

(10) Tribunalul Ilfov I, 13.06.1930, Dreptul, 1930, p.178, in I.Turcu, op.cit., p.14;

(11) Gheorghe Piperea, *„In legatura cu aplicabilitatea procedurii reorganizarii si lichidarii judiciare in unele situatii speciale”*, Revista de Drept Comercial nr.7-8/1996, p.57;

(12) Cas.III, decision no.364/1.03.1929, Revista societatilor si Dreptului comercial, 1929, p.577; M. Jeantin, Paul Le Cannu, op.cit.;

(13) Stanciu D.Carpenu, V.Nemes, M.A.Hotca, Noua lege a insolventei. Legea nr.85/2006. Comentarii pe articole, Ed.a 2 a, Ed. Hamangiu, 2008, p.20, p.34;

(14) G.Ripert/R.Roblot, Philippe Delebecque, Michel Germain, op.cit., nr.2872, p.855;

The significance of this notion: borrower on the cessation of payments lies in impossibility of his exigible liability to face the available assets (“s’il est dans l’impossibilité de faire face à son passif exigible avec son actif disponible”). Art 88, of Law 845/26.06.2005, under the definition of Commercial French Code art.L631 - 1/2008, held by Ordinance 1345/18.12.2008<sup>16</sup> - is not necessary that the company to be in desperate situation or compromised<sup>17</sup>.

The legal definition of payment cessation comes after the jurisprudence manage to give to this notion a big content able to create the distinction between payment cessation and insolvency<sup>18</sup>.

**3.1.1** Through the modification of French insolvency legislation, made by law 845/26.07.2005 were eliminated situations where cessation of payments were not representing a cause of opening collective procedure.

Thus, until January 1 2006, was able to open the recovery and judicial liquidation collective procedure without fulfilling the condition payments terminations in the following three situations:

- against one who didn’t complet a financial obligation assumed together with the creditors agreement („reglement”);
- against traders that took a company in location management( „location gerante”<sup>19</sup>), during a judicial recovery procedure and doesn’t fulfill the obligations stipulated by the assignment plan authorized by the judge; such opening procedure becomes open against debtor without cessation of payments to be;
- when the debtor doesn’t fulfill the financial obligations of the initial plan, the court adjudicate a resolution and open a new recovery procedure<sup>20</sup>.

The special literature decide to drive off this causes of reorganization and judicial liquidation, considering that this exceptional situations should be repealed, suspension of payments regained the only cause necessary for opening the collective procedure, because the debtor redress is a cure and not a sanction<sup>21</sup>.

(<sup>15</sup>) Law of 25 January 1985;

(<sup>16</sup>) Ordonance no.2008-1345 din 18.12. 2008 and Decret no.2009-160 din 12. 02. 2009; Pierre-Michel Le Corre, La reforme du droit des entreprises en difficulté – Commentaire de l’Ordonnance du 18 décembre 2008 et du décret du 12 février 2009, Dalloz, Paris, 2009, p.209; Jean-Pierre Le Gall, Caroline Ruellan, Droit Commercial, Notion Generales, Dalloz, Paris, 2008, p.167;

(<sup>17</sup>) Yves Guyon, op.cit., nr.1121, p.141; G.Ripert/R.Roblot, Philippe Delebecque, Michel Germain, op.cit., nr.2873; Cass.com., 14 février 1978, Bull.cass., 4, nr.66;22 février 1994, RJDA, 1994, 662 s.a.; Code des procedures collectives- Commente, 5e edition, Dalloz, 2007, p.169;

(<sup>18</sup>) Michel Jeantin, Paul Le Cannu, Droit commercial. Instruments de paiement et de credit. Entreprises en difficulté, 5e Edition, Dalloz, Paris, 1999, nr.594, p.383; Code des entreprises en difficulté, Commente sous la direction de Corinne Saint-Alary Houin, premiere edition, LexisNexis, Litec, Paris, 2007, p.250;

(<sup>19</sup>) Jerome Huet, Traite de Droit Civil sous la direction de Jacques Ghestin, Les principaux contracts speciaux, 2 e edition, L.G.D.J., Paris, 2001, n.21116, p.689;

(<sup>20</sup>) G.Ripert/R.Roblot, Philippe Delebecque, Michel Germain, op.cit., p.855;

(<sup>21</sup>) Yves Guyon, op.cit., nr.1123 – 3), p.144;

**3.1.2.** There are no differences between cessation of payments and insolvency, as they are used and understood in English and French law. However, the difference is marked by the notion „available assets”, very important in order to establish with maximum accuracy the existence and the date of payments and commercial societies insolvency. It was considered that „available assets” covers a large „sphere” from both parts, amounts of available money and other assets available to a certain degree of liquidity: real estates on exchange market, commercial effects<sup>22</sup>.

**3.2. In United States of America,** bankruptcy is caused by the incapacity of paying creditors (unable to pay its debts as they become due)<sup>23</sup>, the debtor having the possibility to notice the first its inability to pay – being the one that in 90% cases requires the bankruptcy application procedure before the payments cessation<sup>24</sup>. Therefore, the only condition to open the bankruptcy procedure voluntarily is that the applicant to be a debtor.

Debtor's inability to pay debts, gets appreciated by taking into account different criteria: the number and size of debt outstanding, the proportion of unpaid debts and the common payments delays.

**3.3. In Germany,** The German Insolvency Code (Insolvenzordnung InsO), adopted in October 1994 and entered into effect in January 1 1999, defines insolvency but introduces a new concept for the continental legal system, called – impending inability of payment- as a cause of the opening insolvency procedure.

That for, the opening insolvency procedure is subordinate to the existence of open cause (art 16 InsO), insolvency being the general cause of opening procedure (art 17, paragraph 1, InsO), the debtor being in insolvency if it fails to honor its debts, insolvency being presumed when the debtor ceases payments (art 17, paragraph 2, InsO). In fact, it's about debtors impossibility to face his exigible debts without having any liquidity.

As a general rule, a corporation will be considered unable to pay its debts if doesn't pay around 80-90 % in first 2-3 weeks.

Regarding the inability of impending payments, as a special cause of opening procedure, German law leaves to the borrower the impending incapacity of payment, being able to request the opening procedure when he thinks he will be in impossibility to pay in time his debts. (art 18, InsO).

(22) Yves Guyon, op.cit., nr 1119, p.138; I.Turcu, „*Domeniul, scopul si obiectul noului cod al insolventei Comerciantilor*”, Revista de Drept Comercial nr.10/2002, p.18;

(23) US Code, Titlul 11, [http://www4.law.cornell.edu/uscode/html11/uscode/usc\\_sec\\_11\\_00000101\\_---.html](http://www4.law.cornell.edu/uscode/html11/uscode/usc_sec_11_00000101_---.html); Dictionary of Law, Fourth Edition, Oxford University Press, New York, 1997, p.41; Federal Rules of Bankruptcy procedure 2005, <http://www.law.cornell.edu/rules/frbp/>; Elisabeth Warren, Jay Lawrence Westbrook, The Law of Debtors and Creditors, Second Edition, Little, Brown and Company, Boston, Toronto, London, 1991, p.418;

(24) <http://www.senat.fr> - Service des Etudes Juridique (iunie 2004);

German law dedicates another special cause to this opening procedure, applied only for juridical persons: excess of debt (surendettement), that exist when patrimony of the debtor's assets do not cover existing debts.

Therefor, in Germany are causes of the opening insolvency:

- inability to pay;
- impending insolvency;
- debts excess<sup>25</sup>

**3.4. In Italy**, article 5 of Royal Decree 267/16.03.1942<sup>26</sup>, defines insolvency as a state that doesn't execute the obligations or other extern facts, and which demonstrate that the debtor is not able to pay its debts with regularity, state that may trigger the bankruptcy procedure.

In light of this provisions, insolvency state is identified with inability of paing obligations, assumed at the maturity, not being relevant the circumstance of the debtor's patrimony, not even when the assets are over the liabilities<sup>27</sup>. Through this definition, are indicate the external facts that can proves insolvency, but insolvency can be manifested also through internal facts, known only by the entrepreneur being in the presents of „asimtomatic”<sup>28</sup> insolvency that will be at the basis for the debtor opening procedure.

**3.5. Spain**, through the new law 22/2003 called –competition law- adoptet in July 2003 and came into force in on September 2004, is replacing the old law about bankruptcy procedure, and dedicates a impending insolvency as a cause of the collective opening procedure requested by the debtor.

Until the adoption of 22/2003 Law, spanish law distinguishe between bankruptcy (quibera) and payments suspension (suspension de pagos), but in present defines only the state of insolvency (concurso). Therefor, in view of spanish law on insolvency, the debtor is in insolvency only when he is unable to pay with regularity his debts<sup>29</sup> (art 2, paragraph 2, Law 22/09.07.2003, Concursal).

---

(25) Yves Guyon, op.cit., nr.1108, p.124-125; G.Paisant, “*La reforme de la procedure de traitement du surendettement par la loi du 29 juillet 1998 relative a la lutte contre les exclusion*”, Revue trimestrielle de droit commercial et economique, 1998, 743; Gheorghe Piperea, “*Despre necesitatea extinderii procedurii insolventei la simpli particulari pentru supraindatorare*”, in Probleme actuale ale dreptului bancar, Ed.Wolters Kluwer, 2008;

(26) Royal Decret no.267 of 16.03.1942 - in G.U. no.81 of 6.04.1942, Suplemento Ordinario with it's modification: Law Decret no.35 din 14.03 2005 (Law no.80/14 mai 2005), Law Decret no.5/9.01.2006 and Law Decret no.169 of 12.09.2007;

(27) Barbara Ianniello, Il nuovo diritti fallimentare, Guida alla riforma delle procedure concorsuali, Giuffre, Milano, 2006, p.11;

(28) Francesco Meloncelli, La Conoscenza dello Stato D'Insolvenza nella Revocatoria Fallimentare, Giuffre, Milano, 2002, p.107-115;

(29) Alberto Palomar Olmeda, “*La Normativa de insolvencia en Espana*”, [http://ec.europa.eu/enterprise/entrepreneurship/support\\_measures/failure\\_bankruptcy/conference/palomar\\_slides.pdf](http://ec.europa.eu/enterprise/entrepreneurship/support_measures/failure_bankruptcy/conference/palomar_slides.pdf);

The bankruptcy is presumed to be in debtor's favour when:

- the attempt to recovery a good based on writ of execution failed;
  - there is a suspension of a current payments, and an impound of the debtor assets;
  - in case of fraudulent bankruptcy or precipitated liquidation of debtor assets;
- exist a generalized disrespectful of clear obligations: taxes, social security or salaries.

**3.6. In Britain**, the legal regulation of insolvency is made by the 1986 Insolvency Act, modified by the 2000 Insolvency Act and by the 2002 Enterprises Act<sup>30</sup>.

Insolvency Act applies on both, voluntary liquidations as well as the mandatory, and is completed by secondary legislation of Insolvency Rules.

Under British rules, to be insolvent is the same thing with to be bankrupt, and both represents the incapacity to pay the current debts.

Inability to pay debts is confirmed by the following situations:

- a creditor is claiming for the closing of a 750£ (about 500 Euro) debts, and three weeks later he doesn't obtain satisfaction of his claim;
- creditor, holder of a writ of execution doesn't obtain the execution;
- the court is convinced that the asset is less than the debts, by taking in consideration the payments terms.

**3.7. In Australia**, the collective procedure of insolvency, regulated by Corporation Act of 1993 and modified in 2001, 2002 and 2004<sup>31</sup>, can be triggered at the debtors request, not being necessary that he to be in insolvency, its enough to have just financial difficulties.

Insolvency is presumed if:

- a creditor makes an application in order to receive a payment in 21 days, of a clear and exigible debt, of at least \$2000 Australian (about 1200), but the request didn't produced any effect;
- a creditor, owner of a bond, was not receiving enough;
- a creditor, holding a floating privilege, began implementation of its guarantee, by appointing a impound manager.

**3.8. In Canada**, insolvency issues are regulated by: Bankruptcy and Insolvency Act, BIA, the Law on the arrangements creditors of Companies' Creditors Arrangement Act – CCAA, the Law on the liquidation and restructuring, Winding-up and Restructuring Act WURA.

---

<sup>(30)</sup> The acts can be find on: [http://www.opsi.gov.uk/Acts/acts2000/ukpga\\_20000039\\_en\\_1](http://www.opsi.gov.uk/Acts/acts2000/ukpga_20000039_en_1);

<sup>(31)</sup> [http://www.austlii.edu.au/au/legis/cth/consol\\_act/ba1966142/](http://www.austlii.edu.au/au/legis/cth/consol_act/ba1966142/) and: <http://www.austlii.edu.au/databases.html#cth>;



In view of WURA, a corporation is considered insolvent mainly when<sup>32</sup>:

- is unable to pay debts at maturity;
- when all creditors are convened to close a composition;
- when is presented a situation that is in impossibility to meet its obligation;
- when its recognize its insolvency in any way.

Only WURA is applicable of major financial institutions liquidation including banks, insurance companies.

In view of the BIA<sup>33</sup>, a person is insolvent when its obligations amounted to at least \$ 1000 Canadian (about 600 Euro) and when one is in the following situations:

- when, for whatever reason, is unable to honor its obligations as they become due, is on the payment cessation;
- when it ceases to pay current obligations in the ordinary course of business as they become due;
- all his property-by a fair assessment- are insufficient to pay the obligations.

**3.9. Legislative guide for insolvency law developed by the United Nations International Trade Law (UNCITRAL)** <sup>34</sup> recommends, as the cause of application procedure cessation of payments in respect of the debtor's inability to pay debts and disregarding the „balance criterion” - the liability higher to the assets due to the imprecise and sometimes untimely balance that doesn't indicate the economic value of the company. Guide suggests retention of impending insolvency that allows to anticipate the insolvency<sup>35</sup>.

**3.10. In Romania**, the legal regulation of this collective procedure, met a evolution on a traditional line<sup>36</sup>, using the consistent notion of "cessation of payments" as a cause of the opening of bankruptcy/reorganization and judicial liquidation/insolvency.

„Any tradesman that stopes his payments becomes bankrupt”<sup>37</sup>, „Any trader who stopped payments on its commercial debt, is bankrupt”<sup>38</sup>, „The Court will declare bankruptcy if the trader is in cessation of payments.”<sup>39</sup>

Law no.64 of 22 June 1995 on the reorganization and judicial liquidation procedure break tradition and is using a formula that could provoke controversy:

(32) WURA in: [http://lois.justice.gc.ca/fr/showdoc/cs/W-11//20080805/fr?command=home&call er=SI&fragment=Winding-up&search\\_type=all&day=5&month=8&year=2008&search\\_domain=cs&showall=L&statutyear=all &lengthannual=50&length=50](http://lois.justice.gc.ca/fr/showdoc/cs/W-11//20080805/fr?command=home&call er=SI&fragment=Winding-up&search_type=all&day=5&month=8&year=2008&search_domain=cs&showall=L&statutyear=all &lengthannual=50&length=50);

(33) BIA in: <http://lois.justice.gc.ca/fr/showtdm/cs/B-3>;

(34) [http://www.uncitral.org/pdf/french/texts/insolven/05-80723\\_all%20pagesF.pdf](http://www.uncitral.org/pdf/french/texts/insolven/05-80723_all%20pagesF.pdf);

(35) Jean-Luc Vallens, UNCITRAL 2004 Legislative Guide on Insolvency Law, [http://ec.europa.eu/enterprise/entrepreneurship/support\\_measures/failure\\_bankruptcy/conference/vallens\\_speech.pdf](http://ec.europa.eu/enterprise/entrepreneurship/support_measures/failure_bankruptcy/conference/vallens_speech.pdf);

(36) Mihaïl Pascanu, Drept falimentar roman, Bucuresti, 1927;

(37) Art.185 - Romanian Commercial Code 1840, in Brosura nr.1/ 1.01.1840;

(38) Art.695 –Romanian Commercial Code -1887;

(39) Art.725 – Romanian Commercial Code - 1940, M. Of., First Part No.194/ 23.08. 1940;

Art1 „this law is for traders, individuals and companies who cannot face to the commercial debts (...)”;

- art.20 „the debtor, who cannot face anymore his debt with available money, can adress to the court an application to be subject to the provisions of this law”<sup>40</sup>.

This formulation has received the same meaning as the classical notion of payments cessation<sup>41</sup>, taking into account the provisions of Law 64/1995 that relate specifically to the cessation of payments: „*This condition, as worded, expressing the traditional condition of payments cessation by debtor, required for the application of any collective proceedings against tmerchants in difficulty*”<sup>42</sup>.

The first modification and supplement of law no. 64/1995<sup>43</sup> brought in to attention the notion of „cessation of payment”.

Government Ordinance no.38 of 30 January 2002 to modify Law nr.64/1995 on judicial reorganization and bankruptcy procedure<sup>44</sup>, introduces, as a cause of bankruptcy two notions: the notion of insolvency, which its defines as a „state of the debtor’s assets, characterized by the inability obvious of paying the debts with the money available” and the notion of impounding insolvency (which can be invoked only in the debtor’s request to open the reorganization and bankruptcy proceedings), without defining this notion.

Use of insolvency in the way that is defined by law no.64/1995 -although criticized for its inaccuracies<sup>45</sup>- can be considered as again because it eliminates the difficulties generate from the analysis of the debtor’s behavior towards with the insatisfied creditor, by elimination from interest area of the good or bad beliefs of the debtor.

Therefor, appears to be sufficient the obvious inability of condition for payment debts with money available for the debtor to be in insolvency, in cessation payment<sup>46</sup>.

Law no.149/11.05.2005 modifying Law nr.64/1995 is not changing the definition of insolvency but introduces a presumption of debtor insolvency thru creditors are relieved of the burden of proof the insolvency of their debtor: „Any lender that has one or more uncontested claim, liquids and payable may bring an

(40) Art.20 of Law no.64/22.06. 1995, M. Of., First Part no.130/29.06.1995;

(41) Ion Bacanu, “Inovatiile Legii nr.64/1995 privind procedura falimentului si lichidarii judiciare”, Revista de drept comercial nr.1/1996, p.15;

(42) Stanciu D. Carpenaru, Procedura Reorganizarii si lichidarii judiciare, Ed. Atlas Lex, Bucuresti, 1996, p.37; Mircea N.Costin, Angela Miff, Falimentul, Evolutie si actualitate, Ed.Lumina Lex, Bucuresti, 2000, p.79;

(43) Urgent Government Ordinance no.58 of 27.09. 1997, M. Of., First Part no.265 of 3.10.1997;

(44) M.Of., First Part no.95 of 2.02.2002;

(45) Stanciu D.Carpenaru, op.cit., p.583;

(46) Hans Van Houtte, Intenational Insolvency and bankruptcy law, The law of international trade, Sweet and Maxwell London, 1995, 10.20, in Dumitru Mazilu, “Impactul noilor reglementari privind insolventa asupra schimburilor comerciale ale Romaniei, Proceduri nationale si straine privind insolventa”, Revista de Drept Comercial nr.3/2003, p.163;

application to court against a debtor who is alleged to insolvency due to cessation of payments to it for at least 30 days (...)”- Art. 29, paragraph 1 of Law No.64/1995.

The criticism of the constant changes in the field of insolvency law in Romania appear unjustified in terms of data held by the World Bank according to which, the average age of bankruptcy legislation in the first 10 countries with the best practice in the area: Belgium, Canada, Finland, Ireland, Japan, Republic of Korea, Latvia, Netherlands, Norway, Singapore, is only 6 years, so, legislative efforts of Romania in the direction of bankruptcy regulation entered in international dynamics<sup>47</sup>.

**3.10.1.** Law insolvency no.85/2006 maintain both, an opening of collective proceedings insolvency and the insolvency of the main lines established by previous legislation defining insolvency as „that condition of the debtor's assets are characterized by insufficient funds money to pay debts (Art.3 paragraph 1).

The last modified to the Law no.85/2006 operated by Law nr.277/07.07.2009<sup>48</sup>, insolvency is defined as: "that state of the debtor's assets characterized by insufficient cash funds available for the payment of the debts certain, liquid and exigible.(Art. 3 paragraph 1).

The novelty of the current legal definition of state regulations is imminent insolvency as a cause of collective opening procedure.

Bankruptcy is impounding when it is proven that the debtor cannot pay the debts due to the maturity, as money funds available at the maturity data. (Art. 3, paragraph .1lit.b of Lawnr.85/2006).

The merits condition of the insolvency proceedings, the objective condition of the state of insolvency of one of the persons expressly provided by law, involves a more extensive analysis than simply defining the notion of insolvency or imminent insolvency, of the two defining elements arising under on mutual interdependence: insufficient funds and failure to pay debts.

Defining elements of insolvency to turn their focus to other aspects of a sum whose legal and regulatory clarification and case-law doctrine may set together, precisely the concept of insolvency.

#### 4. Conclusions

Presentation of this causes applying the collective procedure, as a comparative law analysis, found that *the use of the notion of bankruptcy is abandoned by most national laws*, being replaced with the insolvency of the debtor, but the debtor procedure applicable in insolvency is not called reorganization and bankruptcy proceedings but collective insolvency procedures or recovery and liquidation of collective enterprises.

---

(<sup>47</sup>) Daniel Daianu, Dragos Pislaru, Liviu Voinea, “*Aspecte ale falimentului in economia romaneasca – perspectiva comparativa si analiza*”, Institutul European din Romania, Bucuresti, 2004, p.15, www.ier.ro;

(<sup>48</sup>) Law No. 277 of 07.07.2009;

This is because it is considered that the use of the word „bankruptcy (faillite, fallimento, quiebra) in Latin origin countries produce negative connotations<sup>49</sup>.

Court of Justice of the European Communities define the collective procedures as „procedures based on state of payments suspension, the debtor's insolvency or loss of credibility, involving an intervention of judicial authority and lead to a compulsory liquidation and corporate property or at least control of this authority”<sup>50</sup>.

Even in the EU Council Regulation of 29 May 2000 is used the concept of insolvency<sup>51</sup>: Regulation on insolvency proceedings.

Should be noted that, through this community regulatory is not defined the notion of insolvency<sup>52</sup>, but is trying a uniformity of legislation on enterprises in difficulty together with the resolving conflicts of laws and jurisdiction in bankruptcy matters<sup>53</sup>.

On the other hand, the distinction between insolvency and the insolvability does not represents a big interest for the legislator; more important is the insolvency of the debtor in order to open a collective procedure, than the insolvability, which is second important and only for a few national regulations.

And not least, when the insolvency debtor-interested in terms of circumscribing the opening of the collective notion of insolvency, is included here.

In all cases, it is essential that if absence of collective procedure causes, as it is regulated by national law applicable procedure, this procedure can not be applied, regardless of the existence, number and amount of money due and unpaid obligations of a company debtor, it is sufficient to prove the existence of the available money to pay off debts, pay of it not being necessary.

(49) European Commission, Final Report of the expert group, Best project on restructuring, bankruptcy and a fresh start, september 2003, p.7, [www.europa.eu/enterprise/entrepreneurship/sme2chance/doc/failure\\_final\\_en.pdf](http://www.europa.eu/enterprise/entrepreneurship/sme2chance/doc/failure_final_en.pdf);

(50) CJCE, 22 fevr.1979, Gourdain c/Nadler, aff.133/78 citata de Diana Ungureanu, op.cit., p.11;

(51) EU Council Regulation No..1346/2000 of 29 mai 2000, J.Of. L 160 of 30/06/2000, p.001-0018, <http://europa.eu.int/eur-lex/> ;

(52) Jerome Carriat, The Council Regulation 1346/2000 on Insolvency Proceedings, [http://ec.europa.eu/enterprise/entrepreneurship/support\\_measures/failure\\_bankruptcy/conference/carriat\\_slides.pdf](http://ec.europa.eu/enterprise/entrepreneurship/support_measures/failure_bankruptcy/conference/carriat_slides.pdf)

(53) L.Idot, C.Saint-Alary-Houin, Procedures collectives-Droit communautaire en gestion, J.-Cl.Europe, Fsc.871 citat in Michel Jeantin, Paul Le Cannu, op.cit., nr.555, p.360; Daniela Claudia Muntean, <<Regulamentul European de insolventa – Tema centrala a Conferintei “Dezvoltari Actuale in legislatia falimentului” care a avut loc la Dubrovnik-Croatia, in perioada 16-18 noiembrie 2005>>, in R.D.C. nr.3/2006, p.174; I.Turcu, “Creatia dreptului european al falimentului (II)”, R.D.C. nr.4/2001, p.13 si urm.; Bob Wessels, “Improving the operation of the EU Insolvency regulation”, Revista Romana de Drept al Afacerilor, Supliment, I/2007, p.22;