JOURNAL
OF EUROPEAN ECONOMY
Vol. 1 (№ 3). December 2002
Publication Ternopil Academy of National Economy

Thomas HATZIGAGIOS

THE COUNCIL REGULATION ON INSOLVENCY PROCEEDINGS: A TOOL OF GLOBALISATION AND INDIVIDUALISATION IN THE EUROPEAN UNION

Abstract

The «Council Regulation on Insolvency Proceedings» is a result of various legislative efforts since 1960. It establishes original solutions in international bankruptcy within the European Union. These solutions efficiently protect creditors from an insolvent who has his main seat in one member state and has assets or branches in another member state within the European Union. Among these solutions is the establishment of the secondary proceedings. This solution amalgamates the traditional duo of principles of the international insolvency law, such as «universality/unity» and «territoriality/plurality» and it seeks to promote in the European insolvency law the duo «globalisation/individualisation».

Key Words:

bankruptcy law, the European Union, convention on insolvency proceedings, council regulation on insolvency proceedings, cross-border insolvency, main bankruptcy, secondary bankruptcy, universality/unity, territoriality/plurality, globalisation/individualisation, creditors' protection.

Thomas Hatzigagios, Ass. Professor, University of Macedonia, Greece.

I. Introduction

Since 1960[1] the European Community (now European Union) has made many attempts to establish an international bankruptcy convention binding all its member states to strengthen the legal protection of persons established within its territory.

The ideal solution would be the signing of an agreement reached between the various national jurisdictions on a set of rules allowing insolvency proceedings to be opened in one jurisdiction only and for all issues arising in the insolvency to be governed by one set of rules (II).

But the aforementioned ideal solution is too far from current solutions on the national, international and European levels; it is contrary to the well-known classical principles of the international insolvency law such as the duo universality/unity and territoriality/plurality implemented in the various national legislations (III).

At the European level the Istanbul Convention of June 5, 1990, and the European Convention of November 23, 1995, provide a scheme of the secondary bankruptcies proceedings as a successful aforementioned ideal solution able to protect efficiently the debtor's creditors located in a country other than

[1] Projet de convention sur les faillites, concordats et procédures analogues, Supplément 2/82, Bull. C.E.; See for this text and the whole issue: Micheli, I problemi internazionali del fallimento nel mercato comune, Banca, Borsa e titoli di credito, 1963, I, p. 544; Schneider, Zu Fragen des Konkursabkommens der EWG-Staaten, KTS, 1965, p. 88; Noel et Lemontey, Apercus sur le projet de convention européenne relative à la faillite, aux concordats et aux procédures analogues, R.T.D.E. (Revue Trimestrielle de Droit Européen) 1968, p. 703; Muir Hunter, The Draft EEC Bankruptcy Convention – A Further Examination, I.C.L.Q. (International and Comparative Law Quartely) 1976, p. 310; Louis (F) Ganshof, Le projet de convention CCE relative à la faillite, C.D.E. 1983, p. 163; Paul Coppens, Apercu de l'avant-projet de convention européenne sur la faillite, in: Idées nouvelles dans le droit de la faillite, Bruxelles, 1969, p. 169; Luigi Daniele, Les problémes internationaux de la faillite: heur et malheur du projet de convention CEE relative à la faillite, RTDE 1975, p. 159; Michel Poitevin, Les procédures collectives en droit européen, Revue des procédures collectives, 1991, p. 47; Phillippe Woodland, Observations sur les orientations des droits européens le la faillite, J.C.P. (Juris Classeur périodique, La Sémaine Juridique), éd. G, 1984, I, 3137; Gérard Ponceblanc, L'harmonisation des procédures collectives en Europe: Espérances utopiques, Gaz. Pal. (Gazette du Palais), 1990, I, doctr., p. 589; Clarotti, Bilan de l'uniformisation des procédures collectives en droit européens, Banque, no spécial 1989, tom. 1, p. 78; Ubertazzi, Riconoscimento ed esecuzione delle decisioni in materia fallimentare nel progetto C.E.E. sul fallimento, Dir.fal. 1970, I, p. 209; Voulgaris De la compétence judiciaire internationale en matière de faillite dans le cadre de la C.E.E. –Le principe de l'unité de la faillite et ses applications dans l'avant-projet de convention CEE sur la faillite (février 1970) et l'élargissement de la Communauté, Clunet (J.D.I., Journal du Droit International) 1974, p. 522.

that where the insolvency was initially declared (IV)[2]. Recently the European Convention is been replaced by the Council Regulation No.1348/2000.

However, this solution, although being original, is not sufficient enough to resolve definitely the issue if one of the classical principles of international insolvency law is selected and implemented. Furthermore, it seeks to promote another duo of principles in the European insolvency law, the one of «globalisation/individualisation» (V).

II. Legal Attempts of the Issue of International Insolvency at the National, International and European Level

1. At the national level

The transition of countries with closed economy to open market economy has brought among various consequences the major changes in their legislative systems, as well as introduction of bankruptcy legislation. For instance, we can refer to the Russian law on bankruptcy of November 19, 1992[3].

The American legislators have realized the universal bankruptcy law on federal level concerning the American states in 1978 when passed the «Bankruptcy Reform Act»[4].

2. At the international level

At the international level, in addition to many bilateral conventions on international insolvency, there were many attempts to resolve the issues arisen from international insolvency[5].

---

[2] See below, under III, 3.

[3] See for this important legislation: Gavalda and Prompt, Un volet important de mise en place juridique d' une économie de marché dans un système en transition: la loi russe sur la faillite du 19 November 1992, Petites affiches, 23 November 1994, p. 4; Joffroy, La faillite en droit russe: les grands principes généraux, Petites affiches, 28 Octobre 1994, p. 19.

[4] See for this Act: Dahl, Etats-Unis: La faillite sous le chapitre 11, RD aff. Int. 1992, p. 555; Bottiau, Aspects internationaux de la faillite en droit américain, J.D.I. 1992, p. 89; C. Duberstein, Les procédures collectives aux Etats-Unis, RD aff. int. 1989, p. 237; Lebow and Tait, Les effets international de la faillite en droit américain, RD aff. int. 1989, p. 257.

[5] See, for instance: bilateral convention between Italy and France on June 3, 1930; bilateral convention between Germany and Austria on May 25, 1979; bilateral convention between France and Austria on February 27, 1979. See also for these agreements Giannini, Sulla ipresa del progetto di convenzione internazionale sul fallimento, Diritto fallimentare 1953, I, p. 81; Arnold, Der deutsch – oesterreichische Konkurs – und Vergleichs – (Aus-

The United Nations Commission for the International Trade Law, UNCITRAL (La Commission des Nations Unies pour le droit commercial international, CNUDCI), established by the United Nations General Assembly in 1966 has a mission[6] to eliminate the disparities among the national legislations concerning the international trade law. In the framework of the above mentioned mission the UNCITRAL has elaborated and proposed to its member states at the 30th session, on May 1997, a document titled *Law-Type for Cross Border Insolvencies* – loi-type sur l'insolvabilité internationale[7].

The International Bar Association has also been working on a model code for a concordat concerning the cross-border insolvency[8].

3. At the European level

a. Multilateral Conventions

At the European level, there are two multilateral conventions of particular interest. But none is yet in force.

The first one is the "European Convention on Certain International Aspects of Bankruptcy" concluded under the auspices of the Council of Europe and opened for signature in Istanbul on 5 of June, 1990. The states which signed the Convention on that date were Greece, Germany, Belgium, Cyprus, Italy, Luxemburg, France, and Turkey. Of all those states only Cyprus has ratified the Convention which will enter into force after a minimum of three ratifications. The Convention consists of forty-four articles plus two appendices which are declared to be internal to the Convention. According to Article 1, the Convention is applied to «collective insolvency proceedings which entail a disinvestment of the debtor and the appointment of a liquidator and which may entail the liquidation of the assets». The Convention provides certain consequences which will follow from the opening of the proceedings by a competent Court or Authority as determined under Article 4. The principal consequences are that the liquidator may exercise his powers in other parties within prescribed limits (Chapter 2 is titled *Exercise of Certain Powers of the Liquidator*); that secondary bankruptcies may be opened in other parties (Chapter 3 is titled *Secondary Bankruptcies*); that for-

---

gleichs) Vertag vom 25 Mai 1979, Konkurs-Treuhand and Schiedsgericht wesen (KTS) 1985, p. 385; Arlette Martin – Cerf, La faillite internationale: une realité économique pressante, un enchevêtrement juridique croissant, J.D.I. 1995, p. 31, spec. p. 57-67.

[6] Important work of its mission is the convention of arbitration. See extensively P. Fouchard, J.D.I. 1987, p. 86; P. Fouchard, L'arbitrage commercial international, Paris 1965.

[7] See for this text: UNCITRAL Report of the 30th session (may 1997), Doc. Ass.gln., 52d session, suppl. No. 17 (A/52/17) 1997 and its comment by Jean-Luc Vallens, La loi-type de la CNUDCI sur l' insolvabilité internationale, Recueil Dalloz 1998, Chronique, A-15, p. 158; Vallens, La faillite internationale: vers une loi nodèle?, Petites Affiches 1996, No. 72, p. 21.

[8] See Petites at fiches 1995, No. 145, p. 3.

eign creditors have the right to receive information and to lodge proof of their claims in the proceedings (Chapter 4 is titled *Information of the Creditors and Lodgement of Their Claims*)[9]; insurance companies and credit institutions are excluded from the implementation field of this convention.

The second one is the "European Union Convention on Insolvency Proceedings" signed by fourteen of the fifteen member states with the exception of the United Kingdom on 23 November, 1995. Unfortunately, this convention text, though negotiated by and apparently acceptable by all fifteen states, has lapsed. The Convention consists of fifty five articles divided into six chapters together with three annexes. The Convention adopts the same strategic approach as the phase I models, in that it is «direct» or «double» convention and imposes a uniform set of jurisdictional rules which must be applied in all contracting states in cases which fall within the ambit of its provisions (Article 3). There are provisions for recognition of the proceedings and for the exercise of the liquidators' powers in other states (Chapter II of the Convention, Art. 16-26). There are also rules for Jurisdiction and Choice of Law (Article 4, 15), rules that regard creditors involved in insolvency (Chapter II, Art. 16, 26), rules for the opening of secondary proceedings (Art. 27-38) and Chapter 5 deals with the European Court of Justice and confirms powers in order to deliver interpretative rulings concerning the Convention and its various annexes (Articles 43, 46)[10].

---

[9] See for the content of this important Convention Council of Europe, European Treaty Series No. 136; Flechter, Insolvency in Private International Law, National and International approaches, Oxford, Claredon Press, Chapter 7, p. 302; Bottiau, Faillite internationale et Groupes de sociétés, thèse Lille II, 1989, p. 99; Guillenschmidt Jacqueline (de), Projet de convention de l' Europe sur certains aspects internationaux de la faillite, Banque et Droit 1989, No. 7, p. 109; Arnold Hans, Der Europarats-Entwurf eines europaeischen Konkurs-abkommen, ZIP (Zeitschrift fuer Wirtschaftespecht), 1984, p. 1144; Albanese, Activité du Conseil de l'Europe en matière de droit de la faillite, in: Le droit de la faillite internationale, prémier seminaire de droit international et de droit européen, Neuchatel 11-12 Oct. 1985, Erudes suisses de droit international, vol. 46, Zurich 1985, p. 145; Grombrugghe N. Van, The Council of Europe Bankruptcy Convention, International Insolvency and Creditors' Rights Report, 1990, p. 21; Warin, Les procédures collectives dans la CEE, Récueil Dalloz Sirey, 1992, Chron, XIX, p. 99; Obadia. Les procédures collectives en droit européen. Rapport 1990 de la Conférence générale des tribunaux de commerce, Petites affiches, 1991, No. 83, 84, 85, Juris-Classeur Europe, Fasc. 870, No. 192; Bottiau La convention européenne sur certains aspects internationaux de la faillite adoptée par le Conseil des Ministres lors de la 434 réunion des 19/23 Fevrier 1990, Revue des procédures collectives, 1990, p. 97; Ramackers, Reflexions critiques sur la Convention européenne relative à certains aspects internationaux de la faillite, J.C.P., éd. G., 1993, I (Doctrine), No. 3685, p. 277; DOM, La convention européenne sur certains aspects internationaux de la faillite, Petites affiches, 25/12/1991, p. 4.

[10] Balz, The European Union Convention on Insolvency Proceedings, The American Bankruptcy Law Journal 1996, No. 485; Poillot – Peruzzetto, Le créancier de la «faillite européenne»: Commentaire de la Convention des Communautés européennes relative aux procédures d' insolvabilité, J.D.I. 1997, p. 757; Kerckhove, La convention européenne sur les procédures d' insolvabilité, Revue des procédures collectives 1996, p. 277; Monfredi, *Cross-border Insolvency: an Italian Approach*, I.I.R (International Insolvency Law Review) 1999, p. 39.

Both conventions provide for a main bankruptcy to be opened in the state with the main connection with the insolvent and allow for secondary bankruptcy proceeding to be opened in other states in which the insolvent has establishments.

b. The Council Regulation (EC) on insolvency proceedings

Unfortunately, the European Convention on Insolvency Proceedings could not enter into force, because one member state, the United Kingdom, failed to sign it within the time limit.

The Treaty of Amsterdam lays down new provisions for judicial cooperation in civil matters[11]. These provisions are based on «Regulation on Insolvency Proceedings» adopted by the Council of the European Union. This is the «Council Regulation» (EC) No.1346/2000 of 24 May, 2000[12].

III. The Principles of International Insolvency Law

1. The Principles

The liquidation process is going to minimize damage to creditors resulting from bankruptcy, especially when the debtor has assets in a number of member states. The international dimension of insolvency proceedings when the insolvent company owing assets and creditors in several states of the European Community goes bankrupt, presupposes to examine whether principles of universality/unity and territoriality/plurality well-known within the concept of international insolvency law can be applied and enforced.

[11] See J. Basedow, *The Communitarization of the Conflict of Laws under the Treaty of Amsterdam*, C.M.L.R. (Common Market Law Review) 2000, p. 687.
[12] See Official Journal of the European Union, No. L 160, 30.6.2000, p. 1-18.

In international bankruptcy law such principles[13] as universality (principe de l'universalité) and territoriality (principe de la territorialité) which concern with the consequences of bankruptcy and principles of unity (principe de l'unité) and plurality (principe de la pluralité) related to the jurisdiction which determine bankruptcy proceedings, when interlaced together introduce two different ideological approaches which can be enforced within the European Union in case when a debtor (insolvent) has his main seat in a member state and has also assets in another member state.

2. The principles of universality and unity

Under the principles of universality and unity, bankruptcy has a universal notion and consequently concerns all creditors, native and foreign. There is an exclusive bankruptcy proceeding in a particular state which is recognized in all other states and which embraces all the debtor company's assets wherever located. The centre of bankruptcy is unique and is the centre of commercial activities of the debtor company. The purpose of the principles is to achieve a universal submission of the bankrupt estate under the protective umbrella of proper insolvency proceedings. The competent authorities for the adjudication and declaration of bankruptcy are the judicial and administrative authorities of the particular state where the head office of the company is located or the place where the debtor normally administers its main business. It is widely argued that the commencement of administration bankruptcy proceedings in one country hinders the commencement of bankruptcy administration proceedings in another country (unity of bankruptcy). Apparently, the centralization of the whole insolvency in a single proceeding could be to the eminent advantage of the unity system. The unity system basically implies the unity of administration, unity of procedure, unity of distribution of assets and proceeds, and unity of applicable law which will principally mean, as stated above, the application of the law of the country where the insolvency proceedings were opened. The parts of the debtor's assets located abroad would have to be transferred to the central administration with later distribution guaranteed according to the rules of distribution of the *lex fori concursus*. This is also to ensure creditors equality and equal ranking according to one law, so all creditors are treated equally in accordance with the rules of one country. Furthermore, it could be supposed that a single administration

[13] For these principles see: Charousset, Unité de la fallite et universalité des effets dans les pays du Marché Commum, Revue des Syndics et des Administrateurs Judiciaires de France, 1965, p. 269; Alain Hirsch, Vers l' universalité de la fallite au sein du marché commun, Cahiers de Droit European (C.D.E.) 1970, p. 50; Collesanti, Unità e università del fallimento nel progetto di convenzione della CEE, Rivista di Diritto Internazionale Privato e Processuale, 1970, p. 522; Micheli G.A., Universalità e territorialità del fallimento nella CEE, Rivista del diritto processuale (Riv.dir.proc.), 1973, p. 165; G. Bongiorno, Osservazioni in tema di universalità e territorialità del fallimento, Dir. Fall. 1974, I, p. 261. Michel Triochu, Conflits de lois et conflits de juridictions en matière de faillite, 1967, p. 12.

would be as efficient as in purely domestic bankruptcy and the administrator would principally have the same capacity and powers in the second country as those conferred to him in the country in which the insolvency proceedings were opened. The principles of universality and unity describe the substantial aspects of bankruptcy and aim at the application of the principle of par conditio creditorum on international level. International insolvency produces a universal effect and the principles of universality and unity promote practical needs like the simplicity, low cost and speed of the bankruptcy procedure. However it has to be noted that there is a number of difficulties in establishing universality and unity of bankruptcy. It is widely argued that both principles are merely ideal only theoretically and consequently are far from reality. This is because domiciliary laws concerned with cross border-insolvency are very different.

3. The principles of territoriality and plurality

Under the principles of territoriality and plurality, bankruptcy is purely territorial and covers debtor's assets located in one state. Accordingly, the courts of each state exercise jurisdiction only over assets within that state, so there may be concurrent bankruptcy proceedings as there are states in which debtor's assets are located (principle of plurality of bankruptcy). Under the principles of territoriality and plurality a judicial insolvency judgement is of no consequence beyond the borders, and the courts of a particular state do not accept the effectiveness of foreign judgement. In fact, such judgements are considered as non existent and of no consequence. Consequently, under this principle bankruptcy does not have an international effect. Furthermore, it promotes the interests of the local creditors (secured, unsecured) by justification and protection of vested rights and ensures that local assets do not go to pay foreign taxes or foreign preferential creditors. Moreover, it protects debtor's interests and the debtor acquires the chance to stop their commercial activities in one country and continue in another country. The principles of territoriality and plurality aim at the application of the principle of par-conditio creditorum on national level[14] (territorial notion of bankruptcy procedure). Bankruptcy has not got an international effect and is considered as a procedure of compulsory fulfillment or a dominant act of state authority. The principles of territoriality and plurality express the realism of many separate bankruptcies and the procedural character of the process .

[14] For the principle of par conditio creditorum see Raymond de Gentile, Le principe de l'éegalité entre les creanciers chirographaires et la loi de 13 Juillet 1967, Paris, Biboliothèque Houkin, tom 25, 1973.

IV. The Notion of the Schemes of Secondary Bankruptcies

1.

Since the principle of territoriality ignores the effects of foreign bankruptcy procedures and thus considered inappropriate, and since the principle of universality is the most appropriate method conceding cross-border effects on insolvency proceedings, a method of establishing universality in bankruptcy, less strict than the unity approach and capable of overcoming and settling the problem of priorities would surely provide a solution for the efficient creditors' protection. Such scheme is a secondary bankruptcy.

2. The notion

The secondary bankruptcy combines elements of the unity approach. Accordingly, unity and plurality do not occupy dominant place in the approach to a cross-border case, but each should be regarded as a potential option to be employed according to circumstances. The scheme of secondary bankruptcies follows an internationalist approach and is predicated upon the truism that an international insolvency requires a collaborative response on the part of every state which legal or material interests are somehow involved within the fabric of the case. The scheme provides that the commencement of insolvency proceedings at the debtor's principal place of business (main bankruptcy) would provide a separate but coordinated secondary proceedings comprising the debtor's assets in another country. Main proceedings enjoy and encompass the debtor's assets on a worldwide basis, and effect all creditors, wherever located extraterritorial effects throughout all member states and secondary proceedings, which are ancillary or parallel to the main proceedings and are restricted to the territory of the member state in which they are commenced. These proceedings are important as they amount to a localized derogation from the universal effect, otherwise enjoyed by main proceedings involving the same debtor. Cooperation is achieved between the two administrations by exchange of information and consultation; by the right to participate in the main administrator's proceedings in the creditors assembly of the secondary administration and eventually rightfully vote claims of creditors who had lodged their claims in one or the other proceedings. Hence, secondary proceedings are integrated into the overall process of administering the insolvent debtor's estate for the benefit of creditors in general.

3. The advantages

The main advantage of the system of secondary bankruptcies is that it provides solution to the problems of preferences and secured rights. This is a fundamental problem because the issue of priorities is very sensitive and thus demands a carefully designed rule to promote the fairest and most efficient solution.

According to the system of secondary bankruptcies, preferences and secured rights will be treated in accordance with the law governing the secondary bankruptcy to whose assets the collateral (the thing in which security vests) belongs, i.e. the rights on the property at the time of the commencement of the secondary proceedings. The situation remains the same for preferences which enjoy special privileges. Moreover, the *lex fori* of the secondary bankruptcy will determine the existence and the ranking of general preferences provided that the estate of the secondary bankruptcy is concerned with the preference at all. Preferences concerning labour relationships - for labour performed in the state of secondary bankruptcy - give the options of law issues for the treatment of such relationships in case of insolvency. Issues as such could be resolved more easily; consequently, claims arisen from those relationships will be governed by domestic bankruptcy law because those claims are deemed to be located there. Furthermore, issues concerning public law claims (fiscal, social, security claims) will be submitted with preference only if they had arisen in the state of secondary bankruptcy proceedings.

The scheme of secondary bankruptcies has become increasingly favoured recently because of its flexibility and because it provides a workable model that responds to issues actually encountered in practice. That was the reasons for the adoption of the scheme of the secondary bankruptcy proceedings.

V. The Establishment of the Secondary Insolvency Proceedings

It is true that cases of insolvency with cross-border effects affect the proper functioning of the internal market, the main objective of the European Union. With a view to developing more uniform procedures that will avoid incentives for the parties to transfer assets or judicial proceedings from one member state to another in order to obtain a more favourable legal position, the text of the Council Regulation No.1348/2000 relies on the principle of proceedings with universal scope (globalisation) while retaining the possibility of opening secondary proceedings within the territory of the member state concerned (initialisation).

One quarter of cases of insolvency in the European Union are associated with late payments. To combat this cause of bankruptcy, a proposal for a Directive was drawn up on 19 May, 1998[15].

The enaction of secondary proceedings has to effect a special regulation (and protection) for the local creditors in the secondary proceedings (particularization) in order to coordinate this procedure with procedure of the main proceedings as well as with the other secondary proceedings opened in any other member state.

1. Purpose and Scope

In the preamble of mentioned previously Council Regulation the objectives of this legal text are defined as follows:

- to determine the jurisdiction of courts or authorities with regard to the intra-community effects of insolvency proceedings;
- to ensure the recognition and enforcement of judgments given in such matters;
- to make provision for the possibility of opening secondary insolvency proceeding and, finally;
- to guarantee information for creditors and their right to lodge claims.

The Regulation applies to insolvency proceedings opened after its entry into force, which has been defined, according to Article 47 on 31 May, 2001. It replaces existing bilateral and multilateral conventions between two or more member states, and particularly the conventions mentioned in its Article 44.

As regards the concept of insolvency, the definition in Article 1, §1 of the Regulation No.1346/2000 covers bankruptcy (liquidation) proceedings as well as other collective insolvency proceedings in each country annexed to the regulations.

The notion of insolvency is not defined in the regulation. Insolvency means the inability of someone (physical or legal period) to pay their debts in

[15] (See Official Journal of the European Union No.L 166, 11.06.1998, p. 3), titled «Directive 98/26/EC of the European Parliament and of the Council on settlement finality in payment and securities settlement systems». On March 27, 2001 the Commission adopted a proposal for a Directive on financial collateral arrangements [COM (2001) 168 final – not published in the Official Journal]. The abovementioned proposal is made in connection with the Financial Services Action Plan which promotes cross-border transactions in financial services in order to secure the full benefits of the single currency and develop a European financial market that operates well. The Stockholm European Council on 23 and 24 of March 2001, stressed the central importance of the financial market to the economy of the European Union and called on the Council of Ministers and the European Parliament to speed up the implementation of the action plan.

full, either because of lack of available cash at the relevant time or because total liabilities exceed the assets which can be made available to meet them[16].

According to Article 1, §1, the Regulation applies to «collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator». It applies equally to all proceedings, whether the debtor is a natural person or a legal person, a trader or an individual.

The Regulation covers all insolvency proceedings with exception to those concerning:

- credit institutions[17];
- investment undertakings which provide services involving the holding of funds or securities for third parties;
- collective investment undertakings.

2. Jurisdiction and applicable law to the insolvency proceedings

Under the Regulation (Article 3), jurisdiction for insolvency proceedings is conferred to the courts of the member state where the debtor (insolvent) has their center of the main business. In case of a company or legal person, this is the place of the registered office[18].

---

[16] See Aff. 133/1978, Gourtain c/Nadler, European Court of Jurtice, 22 February 1979, Ree. 1979, I, p. 133, that definies as international insolvency – faillite – «les procedures fondeés... sur l'état de cessation de paiement, d'ensolvabilité ou l'ébranlement du crédit du débiteur, impliquant une intervention du l'autorité judiciaire abaitissant à une liquidation forcée et collective des biens ou, à tout le moins, un contrôle de cette autorité»' (text in French).

[17] For these institutions exists a proposal for a Council Directive. The proposal for the Directive concerning rehabilitation, rescue schemes as well as rules for Bankruptcy for credit Institutions, was first presented by the Commission to the Council on 31, December, 1985 (OJ No.C 36 of 8, February, 1988, p.1). In 1994 the provisions for deposit guarantee schemes (see articles 16 of the aforementioned directive) formed the content of a separate - new - Directive (no 94 /19/EEC, OJ No.L 135 on 31 May 1994).. This directive was based on a proposal for a directive by the Commission to the Council on the 14 April 1992 (OJ No.C 163, on 30 June 1992 p.6-10) for deposit guarantee schemes. Before that, there was a proposal by the Commission to the Council (C87/63/EEC) based on article 16 of the directive proposal for rehabilitation, rescue schemes, as well as bankruptcy rules for credit institutions. The Directive on deposit guarantee schemes was designed to protect depositors in the event of an authorized credit institution failing. See the text of the Council of 4 December 1995 (see text number SI 4582/95) concerning the amendment of the already amended proposal of the Directive relating to the reorganization and the winding up of Credit Institution. See for this text, Gortsos, *Directive proposal for the reorganization and the winding up of credit institutions*, ΔΕΕΤ, 1996, page 125.

[18] In the absence of proof to the contrary.

According to Articles 4, §1 and 28 the law governing insolvency proceedings will be the law of the member state where the insolvency proceedings (main or secondary) are initiated (are opened). The applicable law is also the *lex fori concursus*. And the Article 4, §2 defines the questions including in this *lex fori concursus*.

The Regulation does not seek in this matter to unify or harmonise the national laws it accepts as applicable law *lex fori concursus* and it seeks to harmonise the content of the applicable law (conditions for the opening of the proceedings, questions of substance as definition of debtors and assets, effects of proceedings on contracts, individual creditors, claims etc).

The main (principal) proceedings are the proceedings initiated at the center of the debtor's main interests and secondary proceedings[19] are those opened, while main proceedings are in progress, in another member state where the debtor has an establishment. The notion of the establishment given in Article 2h).

The secondary bankruptcy proceedings is a process of liquidation (Article 3, §3). That means that secondary proceedings may be opened subsequently to liquidate debtor's assets located in another member state. And it is closed with the agreement of the liquidator in the main proceedings.

Therefore, the effects of the secondary bankruptcy proceedings are limited to the assets of the debtor located within the territory where the secondary proceedings are opened (Article 27).

---

[19] Examples of secondary bankruptcies and rules for ancillary administration proceedings can be found in several legislations of the world. Recent legislation in the United States, and more specifically Section 3 & 4 of the United States Bankruptcy Code, do not require a formal recognition of the foreign bankruptcy (main bankruptcy). The opening of secondary proceeding is left to the discretion of the Bankruptcy Judge who has the duty to take into account the foreign courts jurisdiction and to the ..... by flexible criteria laid down in section 304(c) of the United States Bankruptcy Code. In English Law section 122 of the Insolvency Act 1914, and Section 426 of the Insolvency Act 1986 which replaced the former, established that English Courts, under circumstances may lend assistance to foreign liquidation proceedings. Specifically, Section 426 (4) of the abovementioned Act provides «The Courts having Jurisdiction in relation to insolvency in any part of the United Kingdom shall assist the Courts having the corresponding Jurisdiction in any other part of the United Kingdom or any relevant country or territory>. It has to be noted for foreign proceedings. In case of discrimination of English creditors in the foreign liquidation, the English courts will be unlikely to hand over assets to the foreign liquidation. Under the Swiss Law formal recognition of the foreign insolvency degree is a prerequisite in order to set in motion the Swiss secondary proceedings. The petition for recognition is made by foreign administrator or a creditor. Recognition will entail the respective consequences of Swiss Insolvency law with regard to the assets located in Switzerland. For further examples see Hanish «Survey over some laws on cross border effects of foreign insolvency procedures of the European Continent», in Flechter, Cross-border insolvency, reports delivered at the XIII International congress of comparative law, Montreal 1990, 1992, p. 149, p. 152.

The courts of the member state where the debtor has an establishment may also claim jurisdiction but only in respect of assets within that jurisdiction and only on a secondary basis if insolvency proceedings have been opened in the place where the debtor's principal business interests are located.

The opening of insolvency proceedings in the member state where the debtor has the center of their main interests is sufficient for the opening of secondary proceedings in another member state where the debtor has the establishment, irrespectively of the fact that the debtor is or not insolvent at the place where he has an establishment. And this fact intends to facilitate the process of the secondary bankruptcy proceedings (Article 22).

If proceedings are first opened at a place where the debtor has an establishment and, subsequently, at the place where the debtor has the center of his main interests, the latter become the main proceedings and the former become the secondary proceedings.

The liquidator of the main insolvency proceedings or any other person of authority (such as creditor) may apply for the opening of the secondary proceedings. However, such creditor (for instance, tax authorities, debtor's employees) must show that they have specific interest in the opening of the secondary proceedings.

The secondary insolvency proceedings are recognized as valid in every member state, except in case where the effects of the decision's recognition are in contrast to the state's public policy. But its effects are limited in the state where the proceedings are opened and restricted to the assets of the debtor located within the state (Article 27).

3. Effects of the secondary insolvency proceedings

The secondary insolvency proceedings function as a regulation tool for individualization if someone examines the provision of the regulation concerning the duty of the liquidator and the protection of the debtor's creditors.

a. The liquidator

According to Article 2b, the «liquidator» is taken to mean «any person or body whose function is to administer assets liquidatation of which the debtor has been divested or to supervise the administration of his affairs». A list of these persons and bodies in each country is annexed to the Regulation. Liquidator operates in the main and in the secondary insolvency proceedings.

The liquidator in the main proceedings appointed by a court with jurisdiction may adopt provisional and preservation measures including assets located abroad. They may in particular have the debtor's assets removed and may bring actions which are in the interests of the creditors if assets were removed from

the state of the main proceedings to another member state after the opening of the proceedings.

The liquidator has a dominant role in the secondary proceedings. That means that they may:

- apply for the opening of the secondary proceedings;
- propose a restructuring plan of composition;
- apply for realization of the assets to be suspended.

At the request of the liquidator in the main proceedings, the appropriate court must stay the secondary proceedings for up to three months, unless the request for the stay is manifestly of no interest to the creditors in the main proceedings.

The stay can be extended for the same period but the court may require the applicant liquidator to take suitable measures to guarantee the interests of the creditors in the secondary liquidation (Article 33).

The liquidator in the main proceedings as well as the liquidator in the secondary proceedings lodge to the other proceedings the claims which are filed at the proceedings for which are nominated if this claim's lodgement serves the interests of the creditors in the proceedings.

The liquidators (the liquidators in the main proceedings as well as the various liquidators in the secondary proceedings) are enjoined to communicate with each other in respective proceedings and each may participate in the other's proceedings on the same basis as creditor. They keep each other informed of any claims which have been lodged and generally they are duty bound to provide mutual information and to cooperate with each other (Article 31).

b. The creditors

The Regulation acknowledges the existence of many creditors' categories such as preferential creditors, secured, unsecured creditors, etc). Among its provisions there is Article 5 that states that the opening of the main proceedings will not affect the rights over assets of the debtor if located within another member state.

The Regulation presumes that preferential creditors should have superior rights throughout the European Union.

Each creditor may lodge their claims in the main proceedings as well as in any secondary proceedings opened in any other member state. The creditors send copies of supporting documents for their claim. They may be required to provide a translation of their claims. However, the creditors' rights can be restricted only with their consent.

The employment contracts and relationships are governed solely by the law of the member state which is applicable to them[20]. Each creditor has the right to lodge their claims in the main proceedings or in any other secondary proceedings. The liquidator in the main proceedings as well as in secondary proceedings has the right to participate as creditor in other proceedings and take part at the creditors' meeting (Article 32, §5).

VI. Conclusion

The adoption of the secondary bankruptcy proceedings by the Council Regulation on cross-border insolvency proceedings provides a model for solving international bankruptcy, because it attempts to satisfy all the creditors of the debtor located anywhere within the European Union. Its efficiency will be seen in the future with its implementation by the national jurisdictions.

[20] The European Union has enancted some legislation which is relevant to bankruptcy by means of directives, such as the Council Directive on 20 October, 1980 (No.80/1987/EEC) on the approximation of the laws of the member states relating to the protection of employees in the event of insolvency of their employer, (Official Journal No.L 283, 28.10.1980, p. 23). The main difficulties encountered in enforcing the Directive 80/987/EEC in the member states by the Commission are to amend the aforementioned text, which should be revised. Such is as the proposal for a Directive of the European Parliament and of the Council amending Council Directive 80/987/EEC in the approximation of the laws of the member states relating to protection of employees in the event of insolvency of their employer, published on 12 March, 2001. The Directive 80/987/EEC seeks to provide employees with a minimum degree of protection under community law in the event if their employer becomes insolvent. To this end, it requires the member states to establish an institution guaranteeing to employees whose employer has become insolvent the payment of their outstanding claims to remuneration for a specific period. The state of insolvency of an employer is defined in Article 2 of the Directive by reference to procedures in place in the member states involving the employer's assets and aiming to satisfy collectively the claims of creditors.