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ROMANIAN INTERNATIONAL INSOLVENCY LAW

By Ieva Azanda, former senior desk officer of the European Integration Bureau
of the Republic of Latvia, azanda@if.uni-frankfurt.de

and

Oliver von Schweinitz, Rechtsreferendar am Landgericht
Frankfurt am Main, oliver_von_schweinitz@yahoo.de

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1. Introduction: The Transposition of the EU Insolvency Regulation and of the UNCITRAL Model Law in Romania

By law N° 637 of 7 Dec 2002 Romania adopted the framework for “regulating private international law relations in the field of insolvency” (hereafter – Romanian International Insolvency Law). Romanian International Insolvency Law consists of three titles dealing with relations with foreign States, relations with the Member States of the European Union (hereafter – EU) and transitional aspects of the new legal regime.

This paper is designed so as to facilitate the reader’s quick apprehension of the main issues relating to the Romanian International Insolvency Law. We thus start by discussing the international heritage of the Romanian International Insolvency Law, then come to its scope, to the effects of recognition of foreign proceedings and its public policy exemption. Having thus explained both the background and the interaction of Romanian international insolvency law, we then will discuss the material provisions of said law by explaining first the rights and duties of the administrator of the estate and then of creditors. The paper will end with a concise conclusion.

We hope that eventually the paper would provide an outline of the most important parts of the Romanian International Insolvency Law. Moreover, it should show the implications created via combination of the provisions of the Model Law and Insolvency Regulation. Finally, we trust that the text reveals our critical thoughts and improvement suggestions regarding Romanian International Insolvency Law. Having outlined the content of the proposed discussion, as well as its structure and aims, we now proceed to revelation of some additional background information and then to the discussion of the substantive provisions of the Romanian International Insolvency Law.

Then start with short description of number of Titles and (possible) chapters and articles accorded to each, to get a flavour of the whole Act

As explained below, Titles I and II of the Romanian International Insolvency Law draw their content from different origins. Exploration of Title I leads to the conclusion that it follows the UNCITRAL Model Law on Cross-Border Insolvency 1997, with Guide to Enactment as published by the United Nations in New York in 1999 (hereafter – Model Law). Slight

variations, however, have been made. Nevertheless, there is plenty of reason for “celebration” since Article 9 of the Romanian International Insolvency Law will achieve uniform application despite the varying wording of the law and the Model law. Apart from enactment of the Model Law, the Romania International Insolvency Law contains provisions copied from the Insolvency Regulation in Title II.

Although Romania is not a member of the European Union and not party of the first round of enlargement, Title II of Romania’s law precisely follows the text of the European Regulation on Insolvency Proceedings (Council Regulation (EC) No. 1346/2000 – hereafter the Insolvency Regulation). The Insolvency Regulation was adopted in May 29th, 2000. Since a regulation is a directly applicable European law¹, there is no transposition phase formally needed. However, certain questions are left to national law.² Moreover, the coherence of national Member State law will usually require adaptations to the existing national insolvency law or to the international private law in the field of insolvency.³ Many of the changes brought about by the new insolvency regulation are so fundamental that the adaptations will probably have to be introduced by formal national law rather than administrative regulation. Romania’s international insolvency law can thus be viewed as one of the first attempts of national implementation of the principles of the Insolvency Regulation.

Such implementation, however, must be viewed cautiously for the following reasons. To start, the implementation of the Insolvency Regulation once again reminds of the problem all the Accession Countries sooner or later have to face. As noted, the nature of a regulation does not require implementation into the national law. Moreover, in order to protect the direct applicability of a regulation, the European Court of Justice has prohibited any purposefully selective transposition of the provisions of regulations into the national laws of the Member States. The European Court of Justice has stated,

*“(...) all methods of implementation are contrary to the treaty which would have the result of creating an obstacle to the direct effect of community regulations and of jeopardizing their simultaneous and uniform application in the whole of the community.”*⁴

Accordingly, national laws containing provisions of the EU law should be recommendable for enactment if the implementation requires a national enactment for reasons of clarity, coherency within the national law or for the practical executability of the regulation.

In particular, a national law should be required if the EU regulation does not contain penalties against infringements, but if the national law should for practical purposes provide for such penalties. Also, only the national law will ultimately define who will be responsible for the enforcement of the EU regulation within its territory.⁵

Many acceding countries have thus chosen to transpose regulations although regulations are directly applicable.

Consequently, before their actual accession to the EU, all the Accession Countries have to make a legislative choice. On the one hand, they have to repeal the provisions of the national

¹ See Article 249 of the EC Treaty.

² E. g., territorial jurisdiction within a Member State, recital 15 of the Insolvency Regulation.

³ See, e.g., G. Moss, I. F. Fletcher (eds), *The EC Regulation on Insolvency Proceedings: Commentary and Annotated Guide*, London, Oxford University Press 2002, pp. 20-21 for a discussion of the amendments to the Insolvency Act 1986 required due to the entry into the force of the Insolvency Regulation.

⁴ See judgement of 7 February 1973 in case C-39/72, *Commission of the European Communities v Italian Republic*, [1973] ECR p. 00101, para 17.

⁵ See judgement of 28 March 1985 in case C-272/83, *Commission of the European Communities v Italian Republic*, [1985] ECR p. 01057, para 27.

laws that copy regulations. On the other hand, they must retain the norms complementing the regulations or ensure their functioning on the national level. As noted, the Romanian International Insolvency Law simply copies the text of the Regulation word by word. Interestingly, at the end of Title II one finds Article 75 stating that the provisions of the Title II have to be supplemented to the extent of compatibility by the provisions of Title I. No doubt, the question is to what extent such supplementation would fill the loopholes that the Insolvency Regulation deliberately leaves to the national law.⁶ Presently it may help to determine the competent courts and authorities within Romania and concretise the procedure for notification of the creditors. However, it does not solve a number of other problems.

With respect to other issues, the case may very well be that eventually the Romanian legislators would have to make huge amendments and insertions in the current Romanian International Insolvency Law. That would have to be done to comply with the rules relating to implementation of regulations, in general, and specifically facilitate the application of the Insolvency Regulation in Romania. It might be argued that should Romania join the EU and accept the *acquis communautaire*, the EU Regulation will within its scope of application supersede the Romanian International Insolvency Law according to Article 4 of said law. That, however, would not dispose with the prohibition to transpose regulations in the national law. Trusting that the reader bears in mind the above preliminary remarks, the paper will continue exploration of the Romanian International Insolvency Law.

2. International Heritage, Civil Law Tradition and the Transition from a State-run Economic System

As noted, Romanian International Insolvency Law draws heavily from international traditions. This perspective of interpretation is spelled out by the wording of Article 9 of said law:

“In the interpretation of the present law its international origin shall be taken into account, as well as the need to promote uniformity in its application and to respect good faith.”

This relates closely to the wording of Art. 8 of the UNCITRAL Model Law:

“In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.”

Presumably, article 9 of the Romanian International Insolvency Law is intended to copy the wording of article 8 of the UNCITRAL Model Law. The to and fro of translating from English into Romanian and vice versa could well have resulted in the slight variations that we find when comparing the Romanian version with its international relative (“to respect good faith” instead of “observance of good faith”).

Indirectly, the European Regulation has through its exemplary function thus extended its scope of immediate application. One major deficiency of its material, express terms, the limitation to the territorial scope of the EU, has thus been partly overcome.⁷ Nevertheless, it

⁶ As suggested by *B. Wessels*, Realisation of the EU Insolvency Regulation in Germany, France and the Netherlands, *European Business Law Review* (forthcoming), some of the current Member States of the EU have recognised the need to complement the bones of the Insolvency Regulation with flesh of the provisions of their domestic laws.

⁷ As to the deficiency of territorial scope of the Insolvency Regulation, *B. Wessels*, Current Developments Towards International Insolvencies in Europe, *International Insolvency Law* (forthcoming).

remains to see whether the said Article 9 could be used to announce that any possible interpretation given by the courts of the EU Member States and possibly also the European Court of Justice (hereafter – ECJ) will be seen as strong guidance for interpretations given by the Romanian courts.⁸ It should also be noted that Title II of Romanian International Insolvency Law encompasses the Insolvency Regulation without its recitals. This deficiency might complicate the interpretative tasks of Romanian courts. Overall, the interpretation of Romanian International Insolvency Law would most likely reveal another general problem related to the transposition of *acquis communautaire* in accession countries. There is always the problem how to incorporate further interpretative changes or explanations of the given measure in the legal systems of accession countries. Up to now one way of doing that has been simply hoping that the countries are so advanced in their transition to western style legal thinking that their administrative bodies and judiciary would follow the case law of the ECJ voluntarily. In the case of Romania, its International Insolvency Law may be one such step towards western legal thinking.

The Romanian International Insolvency Law brings the country closer to western ways of doing business and commercial acting and thinking. While the insolvency law originally was influenced by French law at its initial adoption in 1947, that law was not applied between 1948 and 1990. In 1995, Romania adopted Law 64 of 1995, titled “Law Regarding Judicial Reorganization and Bankruptcy Procedure.” Thereby, it drew both from the old Romanian Commercial Code and from modern western commercial thought. For example, the new insolvency law of 1995 provides for both liquidation and reorganization and is thus modern in its approach. Moreover, the transitional role of certain provisions becomes apparent by taking the following example. The insolvency law is not applicable to State-owned companies for which the government would set-up different monitoring procedures. Due to this interesting ambiguity between civil law traditions, western commercial thought and transitional developments the World Bank has selected Romania for its “insolvency database project”.⁹

Similarly, because of the need to approach western legal traditions, Romania’s step ahead in adopting international insolvency legal concepts as a legislative project was monitored and initiated through several international institutions. The IRIS¹⁰-project of the University of Maryland has been assisting several Eastern European countries in creating a positive institutional framework for the development of asset-based lending and the establishment of a central, computerized registry of security interests.¹¹ From March to June 2002, a Comparative Assessment Study of the Current Insolvency Status in Romania has been carried out by the Center for Social and Economic Research (CASE)¹² in cooperation with the World Bank (funding partially provided by the “Deutsche Stiftung für Internationale Rechtliche Zusammenarbeit”, ‘*German Foundation for International Judicial Cooperation*’).

Thus, the overall history of the Romanian insolvency law as well as the content of the Romanian International Insolvency Law reveals a willingness to adopt western legal traditions

⁸ According to Article 68(1) of the EC Treaty, Article 234 applies to Title IV of the Treaty and therefore also secondary legislation under that title, in cases when (1) a court or tribunal against the decision of which there is no judicial remedy (2) cannot decide a case without an interpretive answer from the ECJ. No doubt, the conditions for obtaining a preliminary ruling on measures adopted under Title IV make the overall process rather long-lasting. That is mainly due to the requirement that the requesting court must be one whose decision cannot be appealed.

⁹ See www4.worldbank.org/legal/legps_bank/insolvency/Romania/Romania.html.

¹⁰ The Center for Institutional Reform and the Informal Sector (IRIS) is a research and advisory center in the Department of Economics at the University of Maryland.

¹¹ See www.iris.umd.edu/adass/proj/closed/centeur.asp

¹² See www.case.com.pl/strona--ID-487853.projekt_id-1474875.nlang-710.html.

and international approaches to insolvency situations. The next part of the paper explores whether the scope of the law supports such approach.

3. The Scope of the Romanian International Insolvency Law

The content of the Romanian International Insolvency Law is described in Article 1. According to that provision the law contains:

1. “norms to determine which law is applicable to a private international law relation in the field of insolvency;
2. procedural norms in litigation’s concerning private international law relations in the field of insolvency;
3. norms concerning the conditions in which qualified Romanian authorities request and, respectively, grant assistance with regard to insolvency proceedings opened on Romanian territory or in a foreign State.”

In short, the Romanian Insolvency Law thus sets out the private international law of insolvency (1) including its procedural aspects (2) and the necessary norms of co-operation between Romanian and foreign authorities (3).

Private international law is the national law determining the material law applicable to factual situation involving an extraneous aspect. It may be a codified body of law as in Germany (“Einführungsgesetz zum Bürgerlichen Gesetzbuch”) or remain largely uncodified as in France, although in the latter country laid down in court decisions. Treaties overlap the national rules of private international law.

A preliminary step to understanding the needs for the new law is to acknowledge that Romania has not signed any bi- or multilateral international insolvency treaty with the member states of the European Union. Romania is not party to the Convention on Insolvency Proceedings¹³ (and its interpretative¹³ report on the Convention on Insolvency Proceedings by Virgos/Schmidt) and thus had to implement the substantive provision of said initiative on its own account. Thus, the own national Romanian law had to remedy to the isolation of Romanian law. In order to apply, the Romanian International Insolvency Law must qualify the situation as arising out of insolvency having an extraneous element. Having made that preliminary qualification, the new Romanian insolvency law will provide a set of collision norms determining the material set of rules applicable to the situation.

The existence of such sets of rules is at least prima facie evidence for a certain degree of open-minded-ness. In medieval Europe, every nation state enviously commanded its judges to apply only its own nation-state law within the national territory. The emergence of private international law has – under circumstances – lead to the application of foreign material law in litigation pending before a national court. The very existence of private international law thus shows great deference to the existence of foreign law.

However, the provisions of the Romanian International Insolvency Law make such deference conditional upon the distinction between foreign countries and the Member States of the EU. Article 2 of the said law enacts Article 1 of the Model Law and suggests that the scope of the law covers assistance and co-ordination of Romanian and foreign proceedings. In the same

¹³ The Convention, which never came into force, is the precursor to the EU Insolvency Regulation. The Insolvency Regulation copies its content closely.

time, Article 34 of the Romanian International Insolvency Law provides that Title II applies to assistance and co-ordination between the proceedings opened in Romania and the Member States of the EU. Thus, Romania International Insolvency Law has a dual scope. That in turn produces different effects of the recognition of the decisions opening insolvency proceedings.

4. The Effects of Recognition

As the private international law shows deference to the material law of a foreign state, so does “recognition” or its weaker form “comity” show deference for the procedural acts regularly performed in a foreign jurisdiction. Concerning the second prong of the scope of the international insolvency regulation, the “procedural norms in litigation concerning private international law relations in the field of insolvency”, the main issue here is thus the recognition of foreign proceedings.

With regard to foreign proceedings two circumstances must be distinguished. Either there is a foreign insolvency proceeding pending and the foreign representative wants to pursue the claims of the creditors against assets located in Romania or such insolvency proceeding is pending in Romania and the Romanian representative is asking foreign court assistance to pursue the Romanian claims abroad. Both factual situations are dealt with by the Title I of the Romanian International Insolvency Law, which follows the structure and content of the Model Law. However, instead of “main and non-main proceedings”, Title I uses the terminology of the Insolvency Regulation labelling the proceedings as main and secondary. It is important to note, though, that Article 18(e) of the Romanian International Insolvency conditions the recognition of foreign judgement opening the proceedings upon reciprocity of recognition of Romanian judgements in the foreign state. In contrast, there is no reciprocity requirement with regard to the Member States of the EU.

There may be insolvency proceedings pending where representative liquidator of an insolvency proceeding in one of the EU Member States (except for Denmark) wants to pursue the claims of the creditors against the assets located in Romania. In such a case, Article 48 of the Romanian International Insolvency Law would oblige the respective Romanian court to recognise the EU proceedings automatically. However, the situation is different when there is a Romanian representative willing to pursue Romanian claims in one of the Member States of the EU. The Romanian International Insolvency Law cannot oblige the courts of the EU Member States to provide automatic recognition for the proceedings opened in Romania. Thus, while automatically recognising the opening of the insolvency proceedings in the EU, the Romania leaves the recognition of Romanian proceedings at the discretion of the EU Member States without any requirement of reciprocity.

The effects of recognition of foreign proceedings can be very important. That is due to the fact that under the Model Law and therefore also under the Romanian International Insolvency Law Title I with regard to the recognition of the foreign proceedings subjects their participants to the effects prescribed under the Romanian law.¹⁴ A creditor might have to reduce his claims by the satisfaction obtained in the foreign proceeding; a debtor might have to be treated as being insolvent in other countries because questioning such insolvency would contradict a foreign proceeding. Most importantly in practice, if a foreign main proceeding is

¹⁴ See *J. Sekolec*, Cross-border Insolvencies: the Impact of the EU Insolvency Regulation, paper presented at International Pallas Conference, 2001, p. 2 specifically pointing out that one of the main differences between the Insolvency Regulation and the Model Law is that the former exports the effects of the main proceeding while the latter only subjects the recognised foreign proceedings to domestic law.

recognized in another country, creditors might have to file their claims according to the procedural norms and delays applicable in that foreign state if they want to avoid being precluded.

These harsh effects of recognition of foreign proceedings can be partially avoided if creditors in the nation-state are allowed to file for secondary proceedings under their own (and known) law. Here, the both provisions of Titles I and II of the Romanian International Insolvency Law provide for concurrent primary and secondary proceedings.

Unlike Title II, Title I of the Romanian International Insolvency Law, however, offers more possibilities to open a local proceeding. For example, the admittance of the foreign procedure cannot prevent filing of a local action under Law No. 64 of 1995 “Regarding Judicial Reorganization and Bankruptcy Procedure”, or registration of an application for the claim admittance under such procedure (Chapter 5, Bankruptcy, Page 77). After the recognition of the foreign procedure, even a main Romanian proceeding may still be opened against the same debtor but only if the debtor is headquartered in Romania.

Recognition under Title I of the now-in-force Romanian law is thus not as far-reaching as under Title II relating to the proceedings in the Member States of the EU. Unlike the stipulations of Title II according to which the recognition of the EU proceedings is absolute, the Romanian law limits the effects of recognition to a form of comity. Under Title I of the Romanian International Insolvency Law, Articles 16-25 institute a formal mechanism for recognition, which is granted individually under narrow conditions. Moreover, the Romanian International Insolvency Law contains two provisions providing that public policy grounds may be a reason for non-recognition.

5. The Public Policy Exception

Both of the main titles of the Romanian International Insolvency Law contain public policy exceptions. While Article 7 of Title I modifies the wording offered by the Model Law, Article 58 of Title II precisely resembles the wording of the Insolvency Regulation. Both approaches are discussed below.

Article 6 of the Model law defines the public policy exception by the following:

“Nothing in this Law prevents the court from refusing to take an action governed by this law if the action would be manifestly contrary to the public policy of this State.”

Thus, the Model law not only provides for such exception but also gives the courts the relevant level of scrutiny (“manifestly contrary”). That level of scrutiny has been slightly modified in the Title I of the Romanian International Insolvency Law (Art. 7):

“Romanian courts will be able to refuse the recognition of foreign proceedings, the execution of a foreign court judgement handed down in such proceedings, of judgements emerging directly from the insolvency proceedings and which are in close connection with it or the approval or any other measure provided in the present law, only in the situations where:

- a) The judgement is the result of fraud committed in the proceedings taking place abroad;
- b) the judgement violates the provisions of public policy of the Romanian State; such grounds for refusal of recognition are represented by the violation of legal provisions concerning the exclusive judgement competence of Romanian courts.”

This section again reveals a slightly lesser embrace of internationalism as compared to the Model Law. The standard of review (manifestly) is left out and exclusive judgement competence of Romanian courts is stated as an explicit public policy exception. Title I of the Romanian International Insolvency Law is thus somewhat sluggish in its embrace of international judgements. However, the exact scope of the public policy exception will be subject to the courts' interpretation and it is thus too early to predict if for example the exclusive judgements competence is a practically important case for the refusal of recognition. Another question is about supplementation of Article 7 of Title I to Article 58 of Title II.

Resembling Article 26 of the Insolvency Regulation, the text of Article 58 includes the word "manifestly" as well as the qualification that reasons for non-recognition should be contradiction with fundamental principles and the constitutional rights and liberties. Thus, the wording of the public policy exceptions included in the Romanian International Insolvency law can provide grounds for different standards of review. No doubt, in practice, the Romanian courts cannot attempt to adjust Article 58 to Article 7 since they would not have competence to examine the competence of the courts of the EU Member States to open the proceedings. Therefore, the case should only be that the courts bring interpretation of the exception included in Article 7 closer to the more restrictive one of Article 58. Thereby Romanian courts should reduce the grounds for non-recognition and give foreign/EU creditors and administrators wide opportunities to participate in Romanian proceedings.

6. The Rights and Duties of the Administrators (Representatives/Liquidators) of the Estate

When speaking of the rights and duties of the administrators the distinction between Romanian/foreign and Romanian/European insolvency proceedings remains in force. Under Title I Romanian representatives have a right to act in foreign countries in accordance with foreign law. What concerns the obligations, Romanian representatives have to co-operate with their foreign counterparts and courts to the greatest extent possible. The foreign administrators, in turn, may obtain *locus standi*, participation and intervention rights in Romanian courts and insolvency proceedings after requesting and obtaining the recognition of the foreign proceedings. In return, they are under obligation to inform the Romanian courts about their status and any other proceedings opened. That should facilitate the co-ordination and decision making in cases when the foreign representatives ask for transitional relief or when there are several concurrent proceedings. Overall, the rights and obligations of the administrators under Title I of the Romania International Insolvency Law closely resemble the provisions of the Model Law. Similarly, the provisions of the Title II resemble the text of the Insolvency Regulation.

Moreover, Annex 3 of the Romanian International Insolvency Law contains the list of the liquidators of the current EU Member States. No doubt, Romanian legislator would have to amend Annex 3 to bring it in the line with the amendments to the Insolvency Regulations brought about by the accession of the new Member States in May 1, 2004. Apart from this technicality, the part concerning the EU and Romanian liquidators brings up several other issues.

To start, Title II of the Romanian International Insolvency Law grants the EU liquidators the powers conferred upon them by the law of the State where the proceedings are opened. It is, no doubt, understandable that Romania lets the liquidators of the EU Member States enjoy the

same rights and obligations in Romania as in their respective EU States. However, the text of the law begs a question as to how Romanians intend to ensure that the EU Member States grant Romanian representatives the right to remove assets from the EU Member States, request opening of the secondary proceedings there and receive the excess of the assets after the distribution takes place in EU secondary proceedings. It should be also noted that the Romanian International Insolvency Law does not contain or refer to any provision determining the procedure for conversion of the main proceedings into secondary. Furthermore, there is a question as to how to “duty bind” the EU liquidators to co-operate and communicate with their Romanian counterparts as envisaged by the Romanian International Insolvency Law. No doubt, most of the complications mentioned may arise due to the nature and applicability of the Insolvency Regulation.

As noted by several authors, the Insolvency Regulation is universal in the EU, but territorial world-wide.¹⁵ The Insolvency Regulation does not contain any provisions dealing with cases when the centre of main interest and, therefore, also the main insolvency proceeding is outside the EU. Consequently, the provisions of the Romanian International Insolvency Law imposing rights and duties upon the Romanian and EU liquidators appear to be one-edged sword “cutting” only the Romanian representatives. While Romanian representatives have to follow a regime of mandatory recognition and co-operation with respect to their EU counterparts, the latter may not be forced to provide equivalent commitments. Eventually the Romanian representatives may only ask the liquidators of the EU Member States to follow the principles of comity in order to maximise the estates in proceedings pending both in the EU and Romania. Unsurprisingly, the situation concerning the rights and obligations of creditors reveals a similar dichotomy.

7. The Rights and Duties of the Creditors of the Estate

Article 14 of Title I of the Romanian International Insolvency Law grants foreign creditors in Romania the same rights as Romanian creditors. No doubt, the said Article closely follows the wording of the Model Law and resembles the idea of non-discrimination of foreign creditors. In contrast, Article 71 of Title II copies the provisions of the Insolvency Regulation stating that only creditors having their domiciles, habitual residencies or registered offices in the EU have the right to lodge claims in the Member States. Bearing in mind the territorial scope of the Insolvency Regulation, such a provision, no doubt, resembles the reality. Nevertheless, the again question is why the Romanian legislators found it necessary to repeat the provisions of the Insolvency Regulation that cannot in any way guarantee the Romanian creditors equal treatment with their counterparts domiciled in the Member States of the EU. No doubt, it can be seen as an attempt to do the pre-accession homework as precisely and verbatim as possible. The problem, however, is that such keenness creates confusion between the rights of Romanian, foreign and the EU creditors and results in badly drafted laws.

Furthermore, Article 72 of the Romanian International Insolvency Law grants creditors from the Member States of the EU the right to receive information about the opening of the proceedings. In the meantime, there is hardly a way to ensure that Romanian creditors would also receive such information from the EU liquidators. To add, the provisions of Title II do not provide any guidance as to the procedure according to which the EU creditors should be informed about the proceedings and lodge their claims in Romania. Luckily, Article 14 and 15

¹⁵ See *G. Moss, I. F. Fletcher (eds)*, (see footnote 3 above), pp. 38-39 emphasizing that cases where the centre of main interest (COMI) is outside the EU are dealt by with the respective private international law provision of national laws of the concerned Member States. See also *B. Wessels, Current Developments Towards International Insolvencies in Europe* (see footnote 7 above).

of Title I refer to Law No. 64 of 1995 “Regarding Judicial Reorganization and Bankruptcy Procedure”. Recalling that Title I supplements Title II, one could, thus, attempt to revert to the said law for guidance with regard to the creditors of the EU Member States. In addition, the possible differences in the treatment different creditors could be to some extent alleviated by the fact that the rules on distribution of the dividends are the same for foreign, EU as well as Romanian creditors.

Finally, Titles I and II of the Romanian International Insolvency Law contain the same rules on distribution of the dividends to creditors of the estate. That must be done in accordance with so-called hotch-pot rule whereby the dividends are distributed proportionally to all creditors of the estate notwithstanding in which proceedings they have lodged their claims. Nevertheless, the distribution of the dividends according to hotch-pot rule is proportional only with respect to creditors having the same ranking. Unsurprisingly Title I of Romanian International Insolvency Law refers the questions of ranking of foreign creditors to the Law No. 64 of 1995 “Regarding Judicial Reorganization and Bankruptcy Procedure”. Thus, the final application of hotch-pot rule depends on whether the Law No. 64 ranks creditors in the same way as particular foreign or EU Member State insolvency law.

10. Conclusion

The Romanian International Insolvency Law is in its technicalities closely drafted in accordance with ideas drawn from the Insolvency Regulation or the Model Law. However, in the area of recognition of foreign judgements (non-EU), Romania’s embrace of international law is somewhat sluggish. Recognition is not automatic, requires a formal, strict and difficult procedure, the public policy exemption is fairly large and Romania protects its national interests further by allowing for concurring “main” proceedings (if headquarters in Romania).

On the one hand Romanian International Insolvency Law shows acceptance of the international reasoning. On the other hand, it aims at defending national interests. With greater trust to the institutions of the EU, it is foreseeable that Romania will finally give up some of its ring-fencing¹⁶ attitudes incorporated in Title I. This slight rigidity towards protecting the national law of insolvency is quite understandable and should not be criticised too easily given that due to the lack of economic prevalence of Romania participants in international insolvency cases will probably try to forum-shop for other legal jurisdictions. The ultimate success of a universal EU-wide level playing field of international insolvency rules will thus depend largely on the strict application of the existing Insolvency Regulation. Only by insisting on its terms, will the EU Insolvency Regulation garner the trust and confidence of the new accession countries and thus ultimately be able to expand its territorial scope.

Although, Romania’s International Insolvency Law is still transitory in its content, it can be seen as an expansion of the EU Insolvency Regulation. The reasoning of the Insolvency Regulation is already so prevalent in the order and language of the Romanian International Insolvency Law that the final step to the EU standard should not be that difficult. Nevertheless, when and if joining the EU Romania would have to make amendments to International Insolvency Law to ensure compliance with the rules on implementation of regulations in the national legal orders. Furthermore, even a brief look at the Romanian

¹⁶ Ring-fencing is very well explained in the speech-excerpt by A. S. *de Vicuna*, Cross Border Aspects of Insolvency and the Principles of Universality and Territoriality, Insolvency Symposium at the ECB, 30 September - 1 October 2005, p. 4.
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International Insolvency Law reminds of the general problems associated with the transposition of the *acquis communautaire* in the pre-accession stage.

Romanian International Insolvency Law attempts to copy the provisions of Insolvency Regulation without evaluating their necessity and feasibility within the national legal order. In addition, there is a need to ensure that the provisions of Romanian International Insolvency Law copying the Insolvency Regulation are indeed interpreted in accordance with interpretation facilitated within the EU. Moreover, there is a bit of confusion between the norms adopted from the Model Law and the ones taken from the Insolvency Regulation. A very critical look at the Romanian International Insolvency Law might even result in apprehension that it would have been better if it included only the Model Law without trying to implement the Insolvency Regulation until the phase of accession. There is little doubt that,

“For a State candidate for the entry in the European Union, the immediate adoption of the UNCITRAL Model Law is advisable because it provides a workable regime for its relations with the States Members of the Union (as well as with other States) until the State joins the Union and becomes bound by the Council Regulation.”¹⁷

In contrast, the overall idea of the Commission that accession countries should transpose not only the provisions of directives but also regulations, and the Insolvency Regulation as one of them, is, at least from a strictly legal perspective, questionable. Nevertheless, the economic and political need for expansion of the territorial scope of the EU law might justify such a strategy also with respect to widening the scope of the Insolvency Regulation.

¹⁷ See *J. Sekolec*, Cross-border Insolvencies: the Impact of the EU Insolvency Regulation, paper presented at International Pallas Conference, 2001, p. 3.
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