# GENERAL ASPECTS REGARDING THE BANK INSOLVENCY IN INTERNATIONAL TRADE LAW

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***Abstract:***
*The aim of the present study is to achieve a short analysis of the interference between the two basic law institutions for the financial market: the insolvency and the credit institution. Through this study we wanted to achieve a general image regarding the bankrupt of the credit institutions in the international trade law. The recommendation and the policies of BCBS have gained the necessary strength through direct implementation in national law. The BCSB principles have been subsequently imported into the common law.*

***Key words:*** *bank insolvency, financial recession, financial market.*

***JEL classification:*** *K33*

## 1. Introduction

The economic principles, just like natural laws cannot be eluded, no matter how inventive the actors on international money markets are. Banks are essential to the global money market and they are tempted to profit from their dominant position on money markets.

The moment the need for the free circulation of capital was accepted on international level, a need generated by the necessity of liquidities the states have and by the collapse of the Bretton Woods system, the state borders have become irrelevant for the multinational banks. Thus a deregulation of money markets occurred, which led, as a direct consequence, to the liberalization of financial services on international level, without the possibility of fully controlling the international financial operations flux by any national supervising authority or central bank.

The credit institutions represent the most important actors on the money market, the majority of money markets being centered on banks.

The major crises in the financial sector are generated by the legal norms or by the lack of legal norms in the sphere of insolvency law. Legal imperfections in the field of insolvency have repercussions on the money markets. Insolvency represents the foundation for the building of financial law.

One cannot build solid money markets unless one has a solid insolvency procedure as a foundation. Money markets cannot grow without the strongly consolidated root of modern regulation of insolvency.

## Materials and methods

The financial system is made up of three segments as follows: banking, insurance and investment banking.

The business of entities regulated by financial system present a high degree of risk and involve the savings of a large number of people. For this reason, the common European legislation imposes to domain a series of drastic measures regarding the correlation of the capital to the risk.

The new Romanian financial regulation, starting from 2006, impose a consolidated supervision of the entire financial system, realized through the collaboration of the three supervising and control authorities of the financial system- the National Bank of Romania, the National Securities Commission and the Insurance Supervisory Commission.

The recommendation and the policies of BCBS (Basel Committee on Banking Supervision) have gained the necessary strength through direct implementation in national law.The BCSB principles have been subsequently imported into the common law.

The Basel I Agreement has been updated in 2003, thus becoming Basel II.

The three types of risk identified by the Basel II Agreement (credit risk, market risk and operational risk) can be dealt with by following some functional and organizational internal mechanisms that every credit institution has.

These mechanisms and procedures are in fact means to prevent the insolvency of the financial institutions.

**Results and discussion**

Confidence in a credit institution is built and held only if the credit institution manages the bank type risks adequately. That is why we tried to make a concise presentation of risks and a more detailed analysis of the more important ones that affect the activity of a credit institution. Any adequate management of bank type risk imposes a detailed knowledge of the risk portfolio and a correct planning of the future evolution of risks.

Risk management is based on a rule according to which there is a direct proportionality ratio between risk and the envisaged lucrativeness of an investment. The greater the risk is, the higher the envisaged lucrativeness of the investment.

Banks can insure themselves against the risk of their own insolvency. The correlation of capital to the risk-which is the first principle of the Basel II Agreement, and the consolidated supervision of the entities regulated by the financial markets-which is the second principle, are imposed to every entity regulated by the financial market. The two aforementioned principles are expressed in the common Regulations of the National Bank of Romania, the National Securities Commission and the Insurance Supervisory Commission.

The banking legislation allows B.N.R. to apply measures for special supervision or special administration when the solvency indicator of the bank falls under a certain value.

The credit institution and also non-banking financial institution are compelled to set up, as part of their organizational and functional structures, departments for internal control and audit, which have the role to prevent the risks of financial crisis.

Banks can ensure themselves against the of their clients insolvency.

At the level of the banking system, institutions have been created with the purpose of efficiently administrating the risks of the banking business; these institutions are the Credit Bureau, the Central Credit Register and the Payment incidents Register.

The Central Credit Register is a database, managed by BNR, in which there are registered natural or legal person who have taken loans.

In order to avoid risk of insolvency of the debitor, the creditor can resort to warranties. The warranties strengthen the state of the creditor who benefits from them, because they create a privileged position for the creditor, in comparison to other creditors. Typically the warranties are either personal or real.

Alongside the two regular types of warranties, the law or the parties of the contract may provision a large variety of atypical warranties, derived either from the personal warranties or from the real ones.

Regulation in the field of money-bank markets has in view the following objectives:

- protection of deposits and the monetary stability, the efficiency and competitiveness of the banking sector; consumer protection and access to services; functional bank structures corroborated with the cooperation between control and jurisdiction organs and the bank regulations on global level; solvency of insurance funds adherent to bank insolvency.

The concise presentation of the problems of credit institutions is organically followed by the analysis of the most important international legal instruments concerning insolvency, taking into consideration the fact that insolvency is a sine qua non condition for opening the bankruptcy proceedings.

Insolvency has been of interest for several international legal instruments. Traditionally insolvency of credit institutions has been excluded from .the larger sphere of international ruling of insolvency. The context in which problems of international law concerning the insolvency of credit institutions are solved requires a preliminary analysis of common law insolvency within the international commercial law.

Creating a unique internal money market in the European Union imposed the issuing of communal norms of secondary law meant to regulate the international private law aspects in the domain of common law insolvency and the insolvency of credit institutions. The concept of insolvency was employed instead of that of bankruptcy because the notion of insolvency permits an approach of bankruptcy prevention means.

Regrettably, bank insolvency is not regulated on international level and this is the reason why the norms of international public law such as "*The guiding Principles*" or "*The good practices*" are so important.

We deem that a model law concerning financial groups would be extremely useful, but there are rulings having the character of recommendation that, in our opinion, prepare such a step, for example the 2008 OECD Guiding Principles concerning multinational enterprises.[4] From this point of view, the involvement of the Basel Committee within the Bank of International Settlements, of OECD and of the European Commission are relevant. We subject to analysis some of the Guiding Principles for bank supervision issued in April 2006 by the Basel Committee.

The first Principle refers to objectives, independence, powers, transparency and cooperation. The second Principle is addressed to permissible activities. The 3rd Principle refers to authorization criteria. The 4th Principle has as its object the significant transfer of shareholding. The 5th Principle refers to major purchases. The 6th Principle shows an important concern of the Basel Committee – adequacy of capital. The 7th Principle compels banks to have an adequate risk management process, and Principles 8, 12, 13, 14, 15 and 16 detail on the specific management of credit risk, of country risk and transfer risk, of market risk, liquidity risk, operational risk and interest rate risk. The 9th Principle refers to assets, provisions and reserves, useful instruments for insuring confidence in banks. Exposures and their limits are dealt with in Principles 10 and 11. inner control and audit are stipulated in Principle 17. Ethical standards in the banking domain are the aim of Principle 18. Banks are compelled to ensure the conduct norms of banking are observed. The efficient bank supervision arises from Principle 19. Principle 20 compels the supervising authority to take concrete supervision measures and keep regular contact with the supervised banks' management.

## Conclusions

Proposals for regulating and changing the way money markets are supervised have been made on international level and regardless of the adopted solutions it is clear that the new structure will be created starting from the existing international frame. The

three risk types identified by The Basel Accord (the credit risk, the market risk and the operational risk) can be managed on the basis of internal organizational and functional mechanisms of each credit institution. These mechanisms and procedures are no other than financial insolvency prevention means.

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