THE CAUSES OF INSURANCE COMPANIES BANKRUPTCY IN ROMANIA

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Abstract

The essential indicator of the financial stability of the insurance companies: their solvency, determines the substantial amendment of the enforcement terms of the insurer's bankruptcy procedure in reference to those imposed for the initiation of the bankruptcy procedure of the regular trading companies, even if the main general coordinates are maintained: the condition concerning the debtor's capacity and the one related to its financial situation.

The survey analyzes the bankruptcy of the insurance companies from the perspective of its main cause, the insolvency, of its specific display forms and last, but not least, from the perspective of the fundamental principles of the functioning of these special entities, by pointing out the extremely particularized features of the insurers' insolvency and, implicitly, of the cause of their bankruptcy in Romania.

Keywords: insolvency, bankruptcy, solvency, insurance companies, Solvency II.

JEL Classification: G33, K12, K22.

I. Introduction

1. Any approach of the bankruptcy of the insurance companies should consider the general characteristics of these special entities: they operate on the financial market, are regulated entities (subject to the permanent monitoring and control of the member state of origin), the risk is the defining coordinate of their activity[1], they perform activities considered to be of general interest and benefit from special legal regulations at European and national level.

These particularities of the activity of the insurance companies justified the adoption of a distinct regulation on their failure and bankruptcy as well.

For a long period of time, the insurers' bankruptcy was not considered to represent a hazard factor for the financial market, but the current stage of the protection need, the main product provided by the insurers determined the unprecedented increase and extension of the insurers' market and, implicitly, the increase of the number of natural persons and legal entities holding insurance policies.

On the other hand, the financial products diversified and thus the risks and investments of the insurance companies, their exposures, are much bigger and much

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1 Risk notion particularities in the insurance field in: Veronica Stoica, "*risk and incertitude idea in the insurance contract*", in Commercial Law Magazine no. 12/20003, p.89;

more complex and the interconnection of the players on the financial market is intense.

Financial systems in the Community are closely linked and events in one Member State can have a significant impact on financial institutions and markets in other Member States. The continuing emergence of financial conglomerates and the blurring of distinctions between the activities of firms in the banking, securities and insurance sectors give rise to additional challenges at national and Community level[2].

Under these circumstances, the insurers' bankruptcy, especially of those holding significant shares of the insurance market, has detrimental, economic and social consequences, even independently from the bank crises and/or financial crises.

At the same time, the known risks of the banking activity, such as: panic and the systemic crises recently affect the insurance sector as well[3].

The bankruptcy of the insurance companies in Romania (EUROASIG, ADAS, CROMA, GRUP AS, METROPOL CIAR[4]) and on the international market {Eurolife Assurance (International) Limited (GIB)[5], Sprinks, Marf[6]} proved that the operational, prudential requirements are not infallible.

For this reason, according to the current conception, the insurers' bankruptcy should be avoided, but when they become a danger for the security of the system, their liquidation should be effected and be carried out so that the insurance service consumers and the public should keep their confidence in the financial market and the protection of the insurance creditors should be guaranteed.

These principles are considered by the current European regulation on the insurers' liquidation -Directive 2001/17/EC- and by the Romanian law: Law no. 503/2004 on the recovery and bankruptcy of the insurance companies[7], in line with the principles of unity, universality and coordination of the bankruptcy procedures or, as applicable, of the winding-up procedures.

2. The essential indicator of the financial stability of the insurance companies: their solvency, determines the substantial amendment of the background conditions of the application of the insurer's bankruptcy procedure as compared to those imposed for the initiation of the bankruptcy procedure of the regular trading

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[2] Commission Decision of 23.01.2009 establishing the Committee of European Insurance and Ocupational Pensions Supervisors, Brussels, 23.01.2009, C(2009) 178 final, http://ec.europa.eu/internal_market/finances/docs/committees/c-2009-178_en.pdf;

[3] Benjamin Laurent, "*Raisons Foundamentales d'une Regulation Prudentielle du secteur des Assurances",* Working Paper no. 08-020, 2008, http://www.solvay.edu/EN/Research/Bernheim/documents/wp08020.pdf;

[4] Source: Insurance Supervisory Board – Guaranteeing Fund Department: http://www.csa-fga.ro/;

[5] The winding-up procedure initiation resolution against Eurolife Assurance (International) Limited was published in the Official Journal of EC no. 12/January 17th, 2008, p.6, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:012:0006:0006:FR:PDF ;

[6] Source: Jerome Bonnard, quoted work, p.40;

[7] According to the provisions of art. 77 in Law no. 503/2004; the provisions of this law are supplemented by the provisions of Law no. 85/2006;

companies, regulated by Law no. 85/2006 on insolvency, even if the main general coordinated are maintained: the *condition on the debtor's capacity and the one related to the financial state hereof, the insolvency state, as well as the bankruptcy procedure initiation cause.*[8]

The particularities of the causes of the application of the insurers' bankruptcy procedure, reflect the specificity of the insurers' activity and will be analyzed in this study exclusively from this perspective, derogatory from the insolvency general law.

The insurers' bankruptcy procedure regulated by Directive 2001/17/EC and Law no. 503/2004 is a special procedural, intended exclusively for the insurers and/or reinsurers, and not to the insurance intermediaries as well[9].

Directive 2001/17/EC does not define the notion of insurers, but refers to the significance hereof granted by the European Directives regulating the insurance activity[10], and Law no. 503/2004 very clearly determines the debtors to which the special bankruptcy procedure is applied: the insurance and/or reinsurance companies[11], Romanian legal entities (art. 2 paragraph 1 in Law no. 32/2000) - inclusively to their branches seated abroad, as well as to the subsidiaries and branches of the insurance companies in other third states, that are seated in Romania-.

As regards the condition on the financial situation of the insurance company, it should be in an insolvency state, genre concept including three particular causes of the application of the procedure to these special entities.

Consequently, the insurance company bankruptcy procedure may be applied only to the insurance companies in a state of insolvency.

Representing a topic insufficiently approached by the specialized literature, the insurers' insolvency has not always been perceived in accordance with its complex and specific significance and we will

try to analyze it from the legal and economic perspective as a useful and important step towards the good comprehension of the causes of the insurers' bankruptcy.

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[8] G.Ripert/Roblot, Philippe Delebeque/Michel Germain, Traité de droit commercial, Tome 2, 16e édition, L.G.D.J., Paris, 2000, p.836; Yves Guyon, Droit des Affaires, Tome 2 –Entreprises en difficulté. Redressement judiciare – Faillite, 7e edition, Economica, Paris, 1999, p.109;

[9] The express provision of exclusion of the insurance intermediaries: the brokers (*"registered brokers", "courtiers d'assurances")* and insurance agencies ("*Independent insurance agents", "agent general d'assurance")* in the field of application of the regulations on the insurers' bankruptcy or, as applicable, of the insurance companies is justified by the fact that they are not insurers; for the analysis of the insurance intermediaries, see: Radu N.Catana, Insurance Law. Insurance Activity Regulation. General Theory of the Insurance Contract, quoted work, p.61;

[10] *„Insurance enterprise means the insurance enterprise having received an official authorization according to art. 6 in Directive 73/239 EEC or art. 6 in Directive 79/239/CEE"* – art. 2 letter a in Directive 2001/17/EC;

[11] The provisions of art. 1 paragraph 1 and art. 2 paragraph 2 in Law no. 503/2004 should be interpreted in a coordinated mode, so that we may not limit the application range of this law only to the insurance companies provided that its application on the "insurers and/or reinsurers" is specified;

II. Application Cause of the Insurance Company Bankruptcy Procedure

3. All the causes that may generate the bankruptcy of the insurance companies are reunited under the form of its insolvency state, generating all the particular causes of the bankruptcy thereof.

Definitely, *the Romanian legislative did not randomly use the insolvency notion*[12]*, due to a perception error of the legal significance of this notion, but considering the real, purely technical or economic cause of the insurers' bankruptcy, cause that it legally consecrated for the performance of the congruence between the economic reality and the legal one.*

The insurer's solvency represents its capacity to deal with all risks or, more precisely, with the risk occurrence. We envisage the risks uncovered in the category of risks that we referred to as technical[13] *(the risks taken over from the policy holders)*[14] *and the risks inherent to its capacity of participant in the financial market: the credit risk, market risk, subscription risk, liquidity risk, operational risk and reputation risk.*

The coverage of the technical risks from the technical reserves and the fact that these technical reserves are not taken into account in the determination of the insolvency margin available to the insurer, do not represent aspects that could entail the exclusion of the technical risks from the category of risks insured by the available solvency margin.

From the economic perspective, the specificity of the insurer's activity is that of the "production cycle reversal" in the sense of the service pricing (the value of the insurance premiums) upon the conclusion of the insurance contract and the subsequent determination of the actual cost of the services ulterior, upon damage occurrence.

For this reason, the initial estimations of the price of the services may not correspond to the actual price thereof, this aspect being assimilated to the subscription risk[15], uncovered by the technical reserves, but from the insurer's net assets.

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[12] In the same sense, also see: Radu N.Catana, Insurance Law. Insurance Activity Regulation. General Theory of the Insurance Contract, quoted work, p.86;

[13] In the same sense: Gheorghe Bistriceanu, Insurance system in Romania, Ed. Economica, Bucharest, 2002, p.412;

[14] Recent economic analyses establish a classification of the main 10 risks of an insurer, among which: the demographic amendments or shifts from the specific market, climate changes and natural calamities, markets of the countries newly entered in the market economy, diversification of the distribution channels, intervention of new regulations and other. In this respect, see: Ernst & Young, „Strategic business risk 2008 – Insurance", http://www.ey.com/Global/assets.nsf/International/Industry_Insurance_StrategicBusinessRisk_2008/$file/Industry_Insurance_StrategicBusinessRisk_2008.pdf;

[15] The subscription risk is the risk of recording losses or of non-obtaining of profits estimated because of the inappropriate determination of the premium fees and/or of the technical reserves, as compared to the undertaken obligations and which may result, without limitation, from frequency fluctuations and the severity of the insured events in reference to the estimations upon subscription –art. 1 item 4 in the Norm implemented by the C.S.A Order. no. 18/September 16th, 2009, published in the Official Journal, Part I no. 21/September 16th, 2009;

The insurer's liquidity risk is deeply related to the technical reserves, as the assets admitted to cover these reserves are mainly liquid assets.

On the other hand, the insurer's solvency is measured by reporting the available solvency margin to the minimal solvency margin[16] or the minimal theoretical margin[17] and the minimal solvency margin determination methods consider either the value of the subscribed gross premiums or the annual average of the paid gross damages.

4. The current mode of determination of the insurer's solvency margin - according of the European norms known as Solvency I - does not fully comply with the prudential requirements, considering the fact that, in the determination hereof, the representative factor of the commitments and the activity volume are taken into account, and not the undertaken risks[18].

Solvency II, project initiated in 2001 by the European Commission, materialized in Directive 2009/138/EC of the European Parliament and of the Council as of November 25th, 2009 on the access to the activity and the performance of the insurance and reinsurance activity (Solvency II)[19], restructures the conception on the insurers' solvency, according to the banks' solvency model.

The structure of Solvency II project, instituted on the template of Basel II Agreement, considers 3 landmarks: *The first refers to the calculation of the technical reserves (provisions) and equities; the second landmark to the supervisory rules; and the third landmark regulates transparency and the dissemination of the information to the insurers.*

As regards the insurers' solvency, Solvency II analyzes and regulates the equities from the perspective of two levels: the solvency capital and the insurers' minimum capital.

The equities are intended to cover 4 types of risks: the credit risk, payment risk, subscription risk (characteristic of the general insurances and of the general ones) and the operational risk whereas each type of risk comprises as well the technical risks uncovered by the technical reserves.

The solvency capital of the Solvency Capital Requirement (SCR) will have a level of alert of the control authorities, that will indicate the difficulties faced by the insurance company as well as the necessity to apply the recovery measures, and it is intended to absorb the unexpected significant losses and the providing of the payment performance guarantee during these periods[20].

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[16] The reporting of the solvency margin available in the security fund, encountered in one of the particular causes of the insurer's bankruptcy considers the exception situation and not the rule;

[17] Antigono Donati, Giovanna Volpe Putzolu, Manuale di diritto delle assicurazioni, Giuffre Editore, Milan, 2006, p.55;

[18] Benjamin Laurent, *"Solvency II: Avancees des travaux; Solvency II – Where do we stand?",* p.5, Revue Bancaire et Financier no. 2/2007, http://ideas.repec.org/p/sol/wpaper/06-022.html;

[19] Directive 2009/138/EC of the European Parliament and of the Council as of November 25th, 2009 on the access to the activity and the performance of the insurance and reinsurance activity (Solvency II), published in the Official Journal of the EU L 335/December 17th, 2009;

[20] Benjamin Laurent, *"Solvency II: Avancees des travaux; Solvency II – Where do we stand?", quoted work, p.10;*

❖ i). Insurers' Insolvency

5. The correct comprehension of the solvency of the insurance companies creates the premises of the detection of the essential aspect of the solvency of these entities, namely of the difference between the usual significance of the solvency of the regular trading companies[21] and the significance of the insurers' solvency.

In fact, the solvency of the insurance company indicates the insurer's capacity to cover the unexpected losses.

Thus, an insurer is solvable if the equity capital - available solvency margin (as the positive difference between the total assets and liabilities) is at least equal to the necessary equity capital determined by mathematic and probabilistic calculations - minimal solvency margin.

The insurer's insolvency indicates an increased risk of incapacity of unexpected (current and possible) loss coverage, and hereby of payment of its liabilities (certain and possible in the future) and should be understood independently from the patrimonial unbalance: the liabilities exceeding the assets.

For this cause, insolvency represents the general cause of application of the insurer's bankruptcy procedure.

Starting from this insolvency significance, according to the law, insolvency state is that state of the insurance company characterized by one of the following situations:

a) obvious incapacity of payment of the exigible debts using the available funds;

b) decrease of the value of the available solvency margin below half the minimal limit

stipulated by the applicable legal regulations for the security fund;

c) impossibility of recovery of the financial situation of the insurance company within

the financial recovery procedure (art. 3 letter j in Law no. 503/2004).

All these situations constitute manifestation forms of the insurer's insolvency, particular cause of initiation of the bankruptcy procedure[22].

❖ ii). Insurers' Insolvency Forms

A) Valid Insolvency of the Exigible Debts by Cash (Liquid Fund Crisis)

6. This form of insurer's insolvency is the correspondent of the insolvency state in the general insolvency regulation and we find, in this cause of the insurers' bankruptcy, the conditions of the insolvency in the general regulation: incapacity of payment and non-payment of the due dates so that we will reveal herein below only

[21] Patrimonial balance or the equality situation of the patrimonial assets and liabilities;

[22] In the same sense: Radu N. Catana, Insurance Law. Insurance Activity Regulation. General Theory of the Insurance Contract, quoted work, p.87;

the specific aspects thereof.

As resulting from the text of art. 3 letter j item 1 in Law no. 503/2004, the defining elements of the insolvency of the insurance company are *the non-payment of the exigible debts and the obvious payment incapacity.*

The prudential requirements dedicated to the insurer's liquidity and its situation in reference to these requirements constitute the specific aspects of the insurer's insolvency in a manner that is similar to the one encountered in terms of banks. The importance of these aspects is revealed particularly under the aspect of proving the existence of the insurer's insolvency.

The insurer's activity is subject to the liquidity risk[23] and, for this reason, the prudential norms determine the coverage modes of this risk by regulations on the insurer's financial investments and by the establishment of the liquidity coefficient as a criterion of the determination of the insurer's capacity to cover the liquidity risk.

The liquidity coefficient represents the ratio of the insurer's liquid assets[24] and short-term liabilities towards the insured and indicates the liquidity risk coverage degree.

In this respect, the insurer is bound to have the liquidity coefficient for the general insurance activity and for the life insurances of at least 1 (one)[25] situation in which the value of the liquid assets is equal to the quantum of the short-term liabilities.

According to the law, the insurer's short-term liabilities towards the insured are represented by the gross damage reserve but, on the one hand, this reserve is constituted by the insurer under the form of assets as well and, on the other hand, the insurer's exigible debts consider other liabilities too, not only the ones towards the insured.

Under these circumstances, the same as in the case of the regular trading companies, *the available funds consider first the cash, the operational cash-flow provided by the funds generated by the subscription operations and the incomes obtained from investments*[26].

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[23] The liquidity risk represents the possibility of recording losses or of non-obtaining of estimated profits resulted from the insurers' impossibility to capitalize assets to honor at any moment and with reasonable the short-term payment obligations or from the difficult collection of the receivables in the insurance /reinsurance contracts - art. 1 item 8 in the CSA Norm as of September 7th, .2009 on the organization principles of an internal control and risk management system, as well as the organization and the development of the internal audit activity in insurers /reinsurers, published in the Official Journal, Part I no. 621/September 16th, 2009;

[24] The following are considered liquid funds: government bonds and bonds issued by the public administration authorities, bank deposits, cash in bank accounts and cashier's office, transferable securities traded on regulated and supervised markets, equity securities in collective investment bodies in transferable securities;

[25] Art. 5 paragraph 6 in the Norm implemented by the CSA Order no. 113130/2006 as amended by the CSA Order no. 17/November 5th, 2008 published in the Official Journal, Part I no. 762/November 11th, 2008; art. 7 paragraph 6 in the Norm implemented by the CSA Order 113131/2006 as amended by the CSA Order no. 18/November 5th, 2008 published in the Official Journal, Part I no. 762/November 11th, 2008 ;

[26] Dan Anghel Constantinescu, quoted work, volume I, p.371;

The insurer may resort, at any moment, to its liquid assets to honor its exigible liabilities, without this indicating the insufficiency of the available funds.

But, a liquidity coefficient below the one determined by the prudential norms indicates the liquidity crises or the imminence of the insurer's liquidity crisis.

The incapacity of payment representing the insufficiency of the available funds[27], equivalent to the liquidity crises of the "cash incident", does not represent an element sufficient to determine the occurrence of the insurer's insolvency state.

The insurer's liquidity crisis may only be overcome by the injection of liquidities obtained from the sale of assets, loans and others

The insurance company should be in valid incapacity of payment, of obtaining sufficient available funds for the payment of the exigible debts respectively, when it is impossible for it to overcome the liquidity crisis.

Among the most recent and significant examples, we indicate that of the American International Group.Inc (AIG), one of the biggest international insurers which, in September 2008, declared its liquidity crisis and requested support from the State to prevent its bankruptcy. The liquidity crisis could be overcome by the loan amounting to 85 billion US$ granted by the American state - United States Federal Reserve.

A last specification needs to be made as regards the nature and quantum of the insurer's exigible debts that it cannot pay.

The failure of the legal standing of the insurance creditors to formulate a petition of the initiation of the insurer's bankruptcy procedure may not indicate the exclusion of the debts generated by the insurance contracts from among the debts considered upon the establishment of the insurer's insolvency state.

When the insolvency is invocated and proved by the debtor insurance company all its debts are taken into accounts: civil, commercial, fiscal, salary and others, therefore including the ones resulted from the insurance contracts.

The minimum quantum of the exigible debts, other than the ones resulted from insurance contracts, should be compliant with the threshold value determined by the general insolvency regulation: 30.000 lei Ron and the equivalent of 6 minimal wages per economy in terms of salary debts.

7.*The insurance company may request the initiation of the bankruptcy procedure within 20 days of the intervention date or, as applicable, of the creation of the insolvency state* (art. 29 paragraph 2 in Law no. 503/2004).

This situation is similar to the one in the regulation of the banks' bankruptcy by the indication of two distinct moments for the calculation of the interval within which the insurer is bound to request the initiation of the bankruptcy procedure: *a) as of the inso9lvency intervention date ; b) as of the insolvency state creation date.*

Thus, *the distinction is made between the current and imminent insolvency, both insolvency*

[27] Stanciu D.Carpenaru, Roman Commercial Law Treaty, Ed. Universul Juridic, 2009, p.708;

types representing causes of the insurer's bankruptcy.

Beyond this specification, the two insolvency types present interest only in case of the insurer's insolvency manifested under the form of its insolvency, as regulated in art. 3 letter j item 1 in Law no. 503/2004.

And this because the insurer is not entitled to request the initiation of the bankruptcy procedure when it is in the insolvency manifested under the forms set out in art. 3 letter j item 2 and item 3 in Law no. 503/2004 respectively in the insolvency crisis or in impossibility to recover the financial situation within the financial recovery procedure.

The significance of the imminent insolvency state granted by art. 3 item 1 letter b in Law no. 85/2006[28] presents gradations in the case of insurers as *its debts exigible in the future are not precisely known.* They are anticipated based on the actuariale calculations.

Obviously, the insurer's imminent insolvency adverts to its liquidity coefficient. If this coefficient drops below 1(one), the insurer is in imminent insolvency.

This situation indicates the fact that the insurer will be in incapacity to pay its forecasted exigible debts using the available funds.

Insolvency supposes the valid incapacity of payment of the exigible debts using the available sums of money[29] so that the obvious character of the payment incapacity characterizes the insurer's imminent insolvency as well.

By the *obvious* character of the imminent payment incapacity we understand *the obvious inability of payment, the impossibility to successfully deal with the liquidity crisis,* to obtain liquid funds in view of regaining the balance of the liquidity coefficient.

The insurer's imminent insolvency is not manifested on the outside and may be invocated only by the debtor insurance company.

As regards the obvious insolvency or the obvious imminent insolvency, it represents a fact, so that in principle, the proof of the insurer's insolvency may be provided by any testimonial means set out in art. 46 in the Commercial Code

The issues raised by the proof of the insurer's insolvency under the aspect of the scope of evidence and of the testimonial means are, to a large extent, similar to those in the general insolvency regulation and we will approach herein below only the derogatory aspects, specific to the insurers' bankruptcy.

Firstly, the demand of the bankruptcy procedure initiation made by the insurance company does not represent an acknowledgement of the insolvency state.

On the other hand, we consider the additional conditions stipulated by law for the admissibility of the demand of bankruptcy procedure initiation formulated by the insurance company or by its creditors, other than the insurance creditors: *"the Insurance Supervisory Board communicated by a statement of defence that there are no actual*

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[28] Insolvency is imminent when proven that the debtor will not be able to duly pay the contracted exigible debts, by the cash available on the maturity date;

[29] Stanciu D. Carpenaru, Roman Commercial Law, Ed.5, All Beck Printing House, Bucharest, 2004, p.585;

possibilities of recovery of the company's financial situation and of payment of the debts to all its creditors within a financial recovery procedure" –art. 31 paragraph 2 letter b in Law no. 503/2004.

Consequently, the confirmation of the insolvency of the impossibility to successfully deal with the liquidity crisis is necessary, by the Insurance Supervisory Board, authority certifying the insolvency existence.

And last but not least the insolvency presumption: *"insolvency is presumed as being obvious when the debtor, 30 days after the maturity date, failed to pay its debt towards one or several creditors"* instituted by art. 3 item 1 letter a) in Law no. 85/2006, is applicable in the insurers' bankruptcy as well, with the specification that this presumption may be reverted by the Insurers' Supervisory Board, if it indicated by statement of defence it indicates the existence of the possibility of the insurer's financial recovery within the financial recovery procedure.

B). Decrease of the available solvency margin value below half the minimal limit stipulated by the legal regulations for the security fund (solvency crisis)

8. The insurer's financial stability, a priority of both the insurer and the supervisory board, is mainly provided by the appropriate coverage of the risks undertaken and guaranteed and of those afferent to its investment activity.

Thus, the insurer is bound to cumulatively the paid share capital and the minimal solvency margin.

In fact, the insurer is bound to hold, at any moment, the available solvency margin[30] *at least at the level of the minimal solvency margin calculated for each operated class of insurances.*

The minimal solvency margin – net assets necessary to cover the losses – is calculated according to the Norms implemented by the CSA Order no. 3/2008 and the CSA Order no. 4/2008.

Essentially, for the general insurances, the minimal solvency margin is determined either by reference to the value of the gross premiums subscribed over the last 12 calendar months, or by reference to the annual average of the gross damages paid over the last 36 calendar months.

For the life insurances, the minimal solvency margin represents a certain percentage of the mathematical reserves.

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[30] *The overall assets items free of any liens, except for the non-tangible assets correspond to the available solvency margin* – art. 2 paragraph 2 in the CSA Norms on the calculation methodology of the solvency margin available to the insurer operating general insurances, of the minimal solvency margin and of the security fund, implemented by the CSA Order no. 3/April 24th, 2008, published in the Official Journal, Part I no. 346/06.05.2008 and art. 2 paragraph 2 in the CSA Norms on the calculation methodology of the solvency margin available to the insurer operating life insurances, of the minimal solvency margin and of the security fund, implemented by the CSA Order no. 4/April 24th, 2008, published in the Official Journal, Part I no. 346/06.05.2008, as both CSA Norms have been amended by the CSA Order no. 12/July 24th, 2009 published in the Official Journal, Part I no. 543/August 5th, 2009;

The available insolvency margin representing the positive difference between the assets and the liabilities – certain and the ones that may materialize in the future (net assets)[31], the insurer's capacity to cover its losses without resorting to the equity should exceed or at least be equal to the minimal solvency margin.

According to the law, one third of the minimal solvency margin should constitute the *security fund* that should have a minimal value equivalent to 3.5 million Euro for the life insurance and a minimal value equivalent to 2.3 million Euro for the general insurances. If the insurer subscribes one or several risks ranged in classes 10, 11, 12, 13, 14 or 15 set out in title B "General Insurances" in appendix no. 1 to Law no. 32/2000[32], with the subsequent amendments and supplements, the minimal value of the security fund will be the equivalent in lei of 3.5 million Euro[33].

Thus, as said, the available solvency margin represents the main indicator of the insurer's financial health, its capacity to cover the unexpected losses so that its decrease below the minimal value set out by the prudential norms (below the value of the minimal solvency margin) indicates financial problems of the company, under the form of solvency crisis.

Under these circumstances, the decrease of the solvency margin below half the minimal limit set out by the legal regulations for the security fund indicates a profound solvency crisis, an irremediably compromised financial situation requiring the initiation of the bankruptcy procedure.

This form of the insurer's insolvency may be accompanied or not by a liquidity crisis and may be independent from the actual ratio of the insurer's assets and liabilities.

The possibility that the future debts, unpredicted loss may not be covered is maximal and, for this reason, the solvency crisis represents the cause of application of the insurer's bankruptcy procedure.

The insurer's insolvency, under the form of the solvency crisis will be provided by the Insurance Supervisory Board by specific documents: the financial statement, financial reports and others, and the scope of the evidence is represented by the value of the insurer's solvency margin below the minimal limit set out by the applicable regulations for the security fund.

C). Impossibility of Recovery of the Financial Situation of the Insurance Company within the Financial Recovery Procedure

9. The insurance companies having a difficult or non-regulatory situation will be subject to specific recovery and/or reorganization measures in view of the avoidance

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31 Dan Anghel Constantinescu, Insurance Treaty, Volume II, quoted work, p.361;

32 The civil liability insurances for motor vehicles, civil liability insurances for the means of air transport, civil liability insurances for the means of sea, lake and river transport, general civil liability insurances, credit insurance and security insurances are considered;

33 According to the provisions of art. 9 paragraph 2 in the Norm implemented by the Order of the Insurance Supervisory Board no. 3/2008;

of the insolvability or of its insolvency, in fact in order to avoid bankruptcy.

The financial recovery procedure represents the entirety of the modes and measures having an administrative character disposed by the Insurance Supervisory Board, as relevant authority, which are intended to maintain or reestablish the financial situation of an insurance company.

The recovery of the insurance companies is an insurers' recovery procedure and not a reorganization one, as the latter is defined by the general insolvency regulation or the European legislation wherein it is indicated that the insurance companies in difficulty may be subject to distinct procedures: of recovery and of reorganization.

In all cases, the insurers' recovery or reorganization is characterized by the absence of the insurer's insolvability or insolvency state as, in terms of the special trading companies, the insolvency or insolvability state indicates the impossibility of financial recovery and initiation of the bankruptcy of these companies.

The causes of the application of the financial recovery procedure are common to both procedure accomplishment modes: based on a recovery plan and by special administration.

According to the law, the insurance company initiates the financial recovery procedure when:

- the insurance company fails to present the Insurance Supervisory Board, within 48 hours of the latter's request, with the financial situation and the minimal solvency margin and when the non-observance of any other legal provisions related to the insurance activity is ascertained, endangering the honorable fulfillment of the obligations undertaken towards the insurance creditors;
- the value of the available solvency margin decreases below the minimal limit set out by the regulations issued by the Insurance Supervisory Board;
- the value of the available solvency margin decreases below the minimal limit set out by the legal regulations for the security fund (art. 7 in Law no. 503/2004).

All the causes of initiation of the recovery procedure indicate the positioning of the insurance company outside the range of the prudential, operational requirements. It is in the insolvency risk situation.

Statistically, the insurance company may survive with an available solvency margin lower than the minimal solvency margin or lower than the minimal legal value of the security fund (without the value of the available solvency margin decreasing below half the minimal value of the security fund), *but the activity performed under these circumstances is affected by an increased insolvency risk, which is unacceptable for the insurance market.*

By exception, the insurer's precarious financial situation is presumed when the insurer fails to comply with the request of the Insurance Supervisory Board to present its financial situation - in a broad sense – indicating all the basic elements of its stability (the financial situation and the available solvency margin).

The right of the Insurance Supervisory Board to estimate the financial situation of an insurance company beyond the used classical elements (the available solvency margin and the security fund) *is revealed by its possibility to decide on the application of the recovery procedure in all the situations on which the insurance company, by the non-observance of the legal provisions, endangers the honorable fulfillment of the obligations undertaken towards the* *insurance creditors.*

Consequently, the recovery procedure may also be initiated as a consequence of the non-observance of the liquidity indicator, of risky investment policies, of the non-compliance of the requirements on the type of assets wherein the security fund and others should be found.

Thus, the range comprising the cases determining the application of the recovery procedure of the insurance companies is much broader, the law providing the basic criteria of its determination.

10. The Insurance Supervisory Board disposes the initiation of the recovery procedure by motivated resolution wherein the financial recovery form applicable to the insurance company in difficulty is indicated: recovery based on a recovery plan or recovery by special administration, procedure intended to reestablish the insurer's operational balance.

The impossibility of recovery of the insurer's financial situation within the financial recovery procedure results in the adoption of the CSA resolution whereby the procedure closure, the withdrawal of the insurer's operation authorization and, as applicable, the revocation of the special administrator are disposed.

If the insurance company was subject to recovery by special administration, the CSA resolution of procedure closure and withdrawal of the operation authorization will have as grounds the reports of the special administrator, whereby it is ascertained that the conditions for the recovery or for the maintenance of the financial situation of the insurance company are not met.

If the insolvency state of the insurance company is ascertained, the registration of the petition of initiation of the insurer's bankruptcy procedure is also decided by the resolution of the financial recovery procedure closure.

The recovery procedure based on a recovery plan or recovery by special administration is intended to reestablish the insurer's operational balance and *the failure to fulfill this objective by specific recovery measures applied in the regulated framework of the administrative procedure of financial recovery corresponds to the insurer's impossibility of recovery, particular cause of the application of the insurer's bankruptcy.*

The proof of the impossibility of recovery of the financial situation of the insurance company within the recovery procedure supposes firstly proving the initiation of the insurer's financial recovery procedure by resolution of the Insurance Supervisory Board (in any of the accomplishment modes of this procedure).

Last but not least, the company's impossibility of financial recovery within this recovery procedure and the insurer's insolvency should be proven as well.

In this respect, according to the provisions of art. 15. letter c), art. 21 paragraph 1 letter b) and art. 32 paragraph 2 letter b) in Law no. 503/2004, the CSA resolution of elaboration of the petition of initiation of the insurer's bankruptcy procedure is based not only on the failure of the financial recovery procedure, but also on the insurer's insolvency[34] , that should be ascertained by this resolution.

III. Conclusions

11. The causes of the application of the bankruptcy procedure of the insurance companies substantiates on the irremediably compromised financial situation.

In the general insolvency regulation, the case of the insolvency procedure application: the insolvency state is not similarly estimated, taking into account the fact that the regular companies are provided with the possibility of the judicial reorganization of the activity.

Law no. 503/2004 opted for the insolvency state as a basic conditions, the cause of the application of the insurance company bankruptcy procedure, considered as genre concept containing three particular causes of application of the bankruptcy of this special trading company: termination of payments (liquidity crisis), insolvency (solvency crisis) and the impossibility of financial recovery.

Insolvency under the form of the liquidity crisis is the common cause of the initiation of the bankruptcy procedure of the insurance companies and regular trading companies.

But, due to the specificity of the insurance activity and to the condition of the obvious character of the incapacity of payment of the exigible debts by the available funds, in this situation, the cause of the application of the bankruptcy procedure is the impossibility to successfully deal with the insolvency, to overcome the liquidity crisis.

The insurers' insolvency as a particular cause of the application of their bankruptcy procedure is not related to the traditional significance of insolvency: the patrimonial liabilities exceeding the patrimonial assets.

The value of the insurer's available solvency margin indicates the coverage degree of the main risks and not the coverage degree of the debts /liabilities.

Insolvency under the form of the insurer's solvency crisis does not indicate liabilities exceeding the assets, but the fact that it faces the incapacity of covering its risks, i.e. the possible losses that could be generated by the occurrence of the main risks of the insurance activity (excluding the insurer's technical risks) and, obviously, is not manifested towards the exterior.

This cause of application of the insurers' bankruptcy is specific of these special procedures, insolvency not being the cause of the application of the insolvency procedure to the common trading companies.

The impossibility of the insurer's financial recovery by means of the recovery procedures represents the ultimate cause of the application of their bankruptcy procedure and it is specific of this special bankruptcy procedure as well.

[34] The insurer's insolvency forms considered herein may only be the ones set out in art. 3 letter j item 1 and item 2 in Law no. 503/2004;

The particularities of all the insurers' insolvency forms justify not only their special regulation, but also a better legal regulation.

The elimination of the use of the insolvency notion as a genre notion and as cause of the insurer's bankruptcy, and the express indication as causes of their bankruptcy of the three real causes of the insurers' bankruptcy (indicated at present as insolvency forms) are necessary.

The causes of the insurers' bankruptcy substantially deviate from their current significances, as encountered either in the general insolvency regulation or in the specialized literature dedicated to the general insolvency regime and are mainly determined by the necessitate to approach the insurers' insolvency from the economic and legal perspective, in accordance with the extremely special characteristics of their activity.

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