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COMPARATIVE ANALYSIS OF THE PRESUMPTIONS FOR THE RECOGNITION OF THE FOREIFGN DECISIONS ON INSTITUTING INSOLVENCY PROCEEDINGS ACCORDING TO CROATIAN AND SERBIAN LAW

U ovom radu pristupili smo uporednoj analizi pretpostavki za priznanje stranih odluka kojima se uspostavlja stečajni postupak po hrvatskom i srpskom pravu, kako bismo utvrdili razlike koje postoje u stečajnoj proceduri u navedenim zemljama. Odlučili smo se za ove nadležnosti, budući da su se zakonodavci, nakon raspada SFRJ, kada su obe države postale nezavisne, opredelili za različite pristupe u pogledu zakona koji regulišu stečajni postupak. Analizirali smo sličnosti i razlike između ovih zakona i način na koji su relevantni pravni dokumenti u domenu uporednog stečajnog prava, kao što su Evropska regulativa o stečajnom postupku i UNCITRAL Model zakon o međunarodnom stečaju, uticali na njihov razvoj. Pri tom smo pokušali da odgovorimo na pitanje zašto su se dve susedne zemlje, nakon pet decenija zajedničke pravne istorije, opredelile za različite pristupe pri usvajanju instituta stečajnog prava i koji su faktori bili presudni u ovom procesu. Posebnu pažnju posvetili smo prednostima i manama koje praksa poznaje pri primeni ovih zakona u pogledu pretpostavki za priznanje stranih odluka u stečajnom postupku u hrvatskom i srpskom pravu. Analiza je izvršena u kontekstu evropskih i međunarodnih pravnih okvira, tj. zakona i regulativa u domenu stečajnog prava, kao i zakona u navedenim državama.

Ključne reči: *stečaj, pretpostavke za priznanje stranih odluka, uporedna pravna analiza, Hrvatska, Srbija, Evropska regulativa o stečajnom postupku, UNCITRAL Model zakon o međunarodnom stečaju*

INTRODUCTION

Development of private law concepts such as private property, commercial exchange, credit and obligation, which are all inherent to modern market economy systems, has enabled persons (legal, natural) to make attempts to manipulate their assets in such a way that their overall material wellbeing is eventually improved[1]. However, having in mind that one of the key consequences of a well implemented market system is its dynamic selection mechanism (which encourages efficient units to replace less efficient ones, and new and improved processes and products to replace older in accordance with the Schumpeterian concept of creative destruction[2]), it is not uncommon that certain entrepreneurs and firms will not be able to withstand the competitive pressure and will, by becoming insolvent, have no other recourse but to exit the market, enabling their resources to move on to more efficient business models[3]. It is thus apparent that insolvency, as a direct effect of market's selection mechanism, is a concept indivisible from the market economy model and, as such, has to be legally regulated through insolvency/bankruptcy law as a fundamental element of the private law system. In other word, there is a significant interdependence between regulation of insolvency and the fundamental institutes of market economy[4], especially when we take into account that insolvency law is one of the basic instruments to protect the market system against its collapse in times of recession and crises[5].

This is especially true for economies transitioning to market systems (much like Croatia and Serbia have done in the mid-late 1990s and early 2000s, respectively), where the selection mechanism is highly emphasized considering that the inherited economic structure is incompatible with the market system and thus has to undertake

[1] Fletcher, I. F. (1999). *Insolvency in private international law: national and international approaches*. Oxford: Clarendon Press, p. 3

[2] Bormann, A. & Spitsa, N. (2007). Specific features of insolvency law in the East European EU member states. *Jahrbuch für Ostrecht 48*, p. 13

[3] Balcerowicz, E. & Hashi, I. & lowitzsch, J. & Szanyi, M. (2003). *The development of insolvency procedures in transition economies: a comparative analysis*. Warsaw: Center for social and economic research, p. 6

[4] Bormann, A. & Spitsa, N. (2007). *op. cit.*, p. 11

[5] *Ibid.*, p. 13

drastic changes, often leading to closure of many enterprises and reorganization of others[6].

After the disintegration process and the war damages which suffered both countries, especially in the field of economy the whole system needed reconstruction and refinancing. Therefore many enterprises entered the insolvency procedure.

The insolvency procedure could be observed as a mean which is created to make the economy and market system more functional since it extinguishes the "sick elements" - which can not stand the competition and the current market conditions.

Bankruptcy laws take on an even greater importance when their potential to provide legal assurance to potential creditors is taken into consideration. Even in the case of financial distress or complete failure of the debtor, there will be a legal recourse available to assure a just distribution of the estate of the bankrupt debtor[7]. Often times the period of transition would also include a certain extent of corrective measures, which might not always compatible with the market system, in order to avoid typical hazards such as abuse and mass closures[8].

From the standpoint of evaluation of debtor's assets insolvency can be defined as either: 1) balance-sheet insolvency - a debtor has negative net assets (combined total of all outstanding liabilities exceeds measurable value of all assets), which is considered to be the traditional concept of insolvency or 2) cash-flow insolvency - a debtor is unable to pay off debts as they fall due (the debtor is unable to command liquidity of assets which would be sufficient to cover debts as they fall due), which is a concept developed in recent times as a reflection of the all-encompassing role of credit in today's social and commercial dealings[9]. This type of insolvency is also relevant, since one of the underlying principles of market economy is that compensation for received goods or services rendered must be paid in agreed upon deadlines[10] On the other hand some creditors may act as though a debtor is insolvent, when in fact it objectively is not (irrelevant of the type of insolvency we consider), given the high

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[6] Balcerowicz, E. & Hashi, I. & lowitzsch, J. & Szanyi, M. (2003). *op. cit.*, p. 6

[7] *Ibid*., p. 6

[8] Bormann, A. & Spitsa, N. (2007). *op. cit.*, p. 23; Balcerowicz, E. & Hashi, I. & lowitzsch, J. & Szanyi, M. (2003). *op. cit.*, p. 7

[9] Fletcher, I. F. (1999). *op. cit.*, p. 3

[10] Dr Đukić-Mijatović, M. (2009). *Vodič kroz stečajni postupak, osvrt na stečajno zakonodavstvo bivših jugoslovenskih republika*. Novi Sad: Ined-grafomedia, p. 17

enough probability that it might become insolvent in the imminent future, which is sometimes referred as imminent insolvency[11]. It is not uncommon that a specific enterprise is insolvent considering their balance-sheet and solvent considering their cash-flow, although it could be true for big companies with long term debt. More common, debtor's financial situation considering his overall balance-sheet might be positive (if enough time were allowed for some of the assets to become liquid and subsequently realized), but his current situation might be such that there is an inability to satisfy creditors whose debts are currently mature. Nowadays, in many countries this fact can be invoked as grounds for initiating formal insolvency proceedings against the debtor. This results in the effective erosion of general confidence in the credit system whereby creditors would have to wait on their debtor's balance-sheet insolvency (which could result in significant reduction of debtor's estate) before any collective satisfaction could be sought. From the observance of this practice, some countries have eventually recognized that a timely intervention into a troubled debtor's financial affairs might lead to ultimate mitigation of insolvency in some cases and diminishing the scale on which it takes place in others, thus often shifting the focus of modern insolvency legislation to remodeling and reorganization of the financial and organizational structure of enterprises instead of their liquidation and elimination[12].

One should always bear in mind also the fact that the insolvency law has been made to protect interests of creditors and shareholders of enterprises as well, and having in mind the notion that the economy and globalization process intensively spreads and connects different parts of the world we decided to dedicate the special attention to the question of the treatment of the presumptions for recognition of foreign decisions on instituting insolvency proceedings according to Croatian and Serbian law.

INTERNATIONAL INSOLVENCY – relevant international documents

Nowadays, national insolvency laws quite often differ in their attitudes towards the rules regulating the institution of insolvency

[11] Jackson, T. H. & Scott, R. E. (1989). On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain. *Virginia Law Review 75*(2), p. 159
[12] Fletcher, I. F. (1999). *op. cit.*, p. 4

proceedings and legal consequences that proceedings have on debtors and creditors[13]. This fact is more obvious when we consider the range of legal interests of the insolvent debtor who are affected by the institution of insolvency proceeding is very extensive, and most of those legal interests are regulated extensively by national law[14]. Therefore, it can be said that the outcome for any interested party might be considerably materially different, depending on which national law is applied considering the facts of the case[15]. As globalization is progressing there is an increasing amount of insolvency cases with an international dimension. For instance, the business of the insolvent debtor or part of his assets might be situated in more than one country[16], the debtor might have had dealings with one or more parties from other countries, liabilities might be owed to creditors predominantly associated with countries other than that of the debtor, or the relevant obligations might be governed by foreign law or may have been incurred outside of debtor's home country[17]. This has led to a considerable increase in significance of international insolvency law and the manner it is regulated on both international and national level[18].

Considering its apparent importance it is no wonder that a number of legal documents relating to the matter of international insolvency have been drafted. If we consider the territory of Europe, as it is defined geographically, as most influential and important legal documents we have the EU Council Regulation 1346/2000 on Insolvency Proceedings from 29th of May 2000, and EU Council Convention on Certain International Aspects of Bankruptcy, also known as Istanbul Convention, and on the other side the international document UNICTRAL's Model Law on Cross-Border Insolvency from 30th May 1997.

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[13] *Ibid.*, p. 5

[14] Garašić, J. (2006). Pretpostavke za priznanje strane odluke o otvaranju stečajnog/insolvencijskog postupka prema hrvatskom pravu. *Zbornik Pravnog fakulteta u Zagrebu 56*(2-3), p. 585, Fletcher, I. F. (1999). *op. cit*., p. 4.

[15] Fletcher, I. F. (1999). *op. cit*., p. 5

[16] Hrastinski Jurčec, Lj. (2008). *International bankruptcy in Croatian legal system, in Legisaltion and Practice, Collection of reports presented at the Regional Conference on Insolvency*. Banja Luka: Jugoslovenski pregled, p. 430

[17] Fletcher, I. F. (1999). *op. cit.*, p. 5

[18] Garašić, J. (2006). *op. cit*., p. 583

Although current trends in the development of international insolvency law tend to focus on unification of rules, practice has shown that this is very hard to achieve. For instance, although the EU Insolvency Regulation 1346/2000 was supposed to facilitate cross-border insolvency cases through uniform rules, inconsistencies in the interpretation of the provisions on jurisdiction have led to English and German courts passing conflicting decisions in the Daisytek case. On the other hand, we have attempts at standardization of rules regulating international insolvency, such as UNCITRAL's Model Law on Cross-Border Insolvency. But, it is also evident, that it is extremely difficult to come up with a uniform set of guidelines which would be applicable in every country, since they all involve different economic situations that basically require different approaches. It is for that reason that Insolvency law should be tailor-made to take into account economic causes and goals, commercial customs and legal culture and also the level of development of the social system and of the institutional framework[19].

Therefore, it could be then considered as more strange to find that two countries, which were developing their economies under the same communist regime for 50 years and wanting to become members of the same EU family, are now going on their different ways by defining elementary insolvency law institutes and approaches influenced by different legal documents.

RECOGNITION OF FOREIGN DECISIONS INSTITUTING INSOLVENCY PROCEEDINGS

An international element in an insolvency proceeding exists when the property of the debtor is located abroad partly or in whole, or when the creditors or insolvency debtors are persons with foreign citizenship, or have their seat or residence abroad[20].

Insolvency law is a set of legal norms that regulate the matter of insolvency in the formal and material sense of the word. In the material sense insolvency is defined as general enforcement on the property of the insolvent debtor due to his insolvency (1), and with the purpose of collective settlement of his creditors, whereby the debtor ceases to exist as a subject of law (2). In the formal sense insolvency

[19] Bormann, A. & Spitsa, N. (2007). *op. cit*., pp. 21-22

[20] Dr Čolović, V. (2002), Međunarodni stečaj u domaćem i uporednom pravu. *Strani pravni život 1*(1-3), p. 96

represents a system of norms that regulate the actions of parties and the court in regards to instituting the insolvency proceedings, determining the conditions for opening of the proceedings, effects of the proceedings, collecting and cashing in the assets of the insolvent debtor and the settlement of his creditors.

Insolvency law with international elements is a set of legal norms that regulate conflict of jurisdiction and conflict of law, as well as the recognition and enforcement of foreign insolvency proceedings.

Concerning national insolvency law that also considers insolvency proceedings with international elements the main areas of concern are the regulation of conflicts of laws and jurisdictions and the recognition and execution of foreign insolvency proceedings[21]. We also have two modalities of such proceedings: 1) domestic insolvency proceedings with foreign elements, and 2) foreign insolvency proceedings for which recognition is requested with domestic courts[22]. The focus of this paper will be on the recognition of foreign decisions instituting insolvency proceedings, more specifically the presumptions for their recognition and their comparative analysis on the example of relevant legislation of Croatia and Serbia.

Although private international law norms, including those that refer to international insolvency proceedings are very diverse we can still cautiously identify two dominant principles of international insolvency law regarding the recognition of foreign decisions instituting insolvency proceedings. They are: 1) the principle of universality, as a liberal international insolvency principle, now accepted in most countries in some form, whereby the effects of an insolvency proceedings instituted in one country are recognized in other countries as well. In reality this principle is almost always restricted, considering that countries are very reserved when it comes to providing unconditional extraterritoriality to foreign decisions, which is why domestic courts use lex fori rules (as the law of the jurisdiction where the action is pending), or lex loci rei sitae rules (as the law of the jurisdiction of where the property is located) during the recognition proceedings. The other, opposing principle is: 2) the principle of territoriality, as a conservative international insolvency principle, whereby the effect of foreign decisions instituting insolvency proceedings is confided only to debtor's assets located

[21] Garašić, J. (2006) *op. cit*., pp. 584-585, Fletcher, I. F. (1999). *op. cit.*, p. 5
[22] Garašić, J. (2006). *op. cit.*, p. 585

within the territorial jurisdiction of the country in which the proceedings are open[23]. Enforcement of foreign decisions instituting insolvency proceedings is always conducted under the rules of lex fori of the country that recognizes the decision[24].

According to the principle of universality, once a insolvency proceeding is instituted, it has effect on entire estate of the debtor, without regard to where it is located. On the other hand, the principle of territoriality says that the only effected property is that located on the territory of the state where the proceeding was instituted, it does not effect debtor's property abroad[25].

But these principles have never been applied in their original form, with the notable exception of former insolvency legislation of Japan, where the principle of territoriality was strictly maintained for both inward and outward modes of application[26].

After we have exposed two basic principles which are dominant in the field of recognition of foreign decisions we must add that regulation of international insolvency, or insolvency proceedings with international elements, differs from state to state. However, it should be always regulated having in mind one leading idea - the settlement of creditors

Even that is the fundamental goal the newer legislation usually starts, from the unity of the insolvency proceeding and the unity of the insolvency mass. These institutes are defined in the EU Council Convention on Certain International Aspects of Bankruptcy, as well as many other international sources[27].

The ways in which the foreign decisions could be recognized are automatic or formal recognition. Supranational models adopt either the rule of automatic recognition – As it is in the EU Insolvency Regulation, or the rules of the formal recognition procedure are greatly simplified and the presumptions altered so as to facilitate easier recognition. This way it is possible to remove one of the most

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[23] Jovanović-Zattila, M. Čolovic, V. (2007). *Stečajno pravo*. Beograd: Dosije, pp. 226

[24] *Ibid.*, pp. 227

[25] Knežević-Bojović, A. (2009). *Stečajni postupak sa elementom inostranosti in Zbornik radova / [VI] Međunarodna konferencija Regionalna saradnja u oblasti građanskog sudskog postupka sa međunarodnim elementom*. Banja Luka: Pravni fakultet, p. 228

[26] Knežević-Bojović, A. (2009). *op. cit*., p. 228, Fletcher, I. F. (1999). *op. cit.*, p. 12

[27] Dr Čolović, V. (2002), *op. cit*., p. 95

common practical problems related to the recognition of foreign decisions. The UNICTRAL Model Law enforceability is also not a presumption for recognition, while in the Croatian model it is[28].

Whether there would be automatic recognition or the recognition requires special formal recognition procedure depends actually on the civil private law concept of the jurisdiction in question. Even though, from the point of legal certainty and accordance with the system in which it should be recognized, we believe that it is better to have the request for formal recognition in order to obtain the legal cohesion – the way in which is actually solved in both Serbian and Croatian law. It is also important to emphasize that modern Serbian law, as well as Croatian does not require reciprocity any more, which would mean the introduction of the legal tolerance into the system and treatment which is placed on equal footing (this issue will also be dealt with more broadly in the next pages).

INSOLVENCY LAWS OF REPUBLIC OF CROATIA AND SERBIA

Even though it was mentioned in the 1989 Serbian Law on Enforced Settlement, Bankruptcy and Liquidation[29] the matter of international insolvency was regulated by the Law on Bankruptcy Proceedings or Republic of Serbia more thoroughly than ever. This law has not only been modeled on UNCITRAL Model Law, but has literally replicated its provisions[30]. However, we find that it is necessary to alter this text to some degree and complement it with provisions from the European Insolvency Regulation 1346/2000[31].

UNICITRAL Model Law introduces certain presumptions in the process of recognition of foreign insolvency decisions. However, it is not without its faults. One such fault which was amended in Croatian Insolvency model is the fact that UNICTRAL Model Law does not provide legal cure against a decision on recognition, whether positive or negative. This is, however changed in the 2009 Law on Bankruptcy

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[28] Knežević-Bojović, A. (2009). *op. cit*., p. 245

[29] Šarkić, N. & Stanivuk, B. (2007). Pretpostavke priznanja stečajnih postupaka sa elementom inostranosti prema pravu Republike Srbije i pravu Republike Hrvatske - komparativni prikaz. *Izbor sudske prakse 15*(6), p. 24

[30] Rakić-Vodinelić, V. & Šarkić, N. et al. (2006). *Simpozijum u Ohridu: prilozi o reformi stečajnog prava u zemljama južne Evrope*. Bremen: GTZ, p. 110

[31] Dr Đukić-Mijatović, M. (2009). *op. cit*., p. 117

(hereinafter LB RS), where in Art. 188 the debtor and other interested parties may request the annulment or alteration of the decision. Apart from that, this model does not provide for the publishing of the submitted proposal for recognition, nor the decision on recognition (as a consequence the 2004 LBP RS did not have such provisions also, and unfortunately the 2009 LB RS does not, as well). These rules exist in the Croatian model which provides for the improved position of both domestic and foreign creditors, as well as the foreign bankruptcy administrator[32].

The LBP RS was enacted in 2004 and went into force on 1st February 2005. The provisions on International Insolvency, namely Arts. 146-178 are confined to Chapter XII – Bankruptcy proceedings with international elements[33].

As far as earlier Serbian insolvency legislation is concerned we have the 1989 Law on Enforced Settlement, Bankruptcy and Liquidation that contained only four provisions that dealt with the matter of international insolvency (Arts. 160-164), which is not enough considering the importance of the matter it deals with. Also only one of them relating to the presumptions and procedure regarding the recognition of foreign decisions instituting insolvency proceedings. This was Art. 161 which read: "Decisions of foreign courts rendered in the course of enforced settlement or bankruptcy proceedings agains a debtor with a seat of business, or residence on the territory of the foreign court are recognized in SRY under the conditions prescribed for the recognition of foreign judicial decisions within the law of SRY; The decision in Para. 1 of this provision shall be published in the "Official Gazette of SRY" in a manner prescribed in this law for the publication of decisions instituting enforced settlement or bankruptcy proceedings".

Before the year of 2004, and before the insolvency law that managed to leave some traces in practice as well, and therefore to make some changes in comparison to previous state in that field we should mention that the law which was than in force was pretty much based on LRCL - Law on Resolution of Conflict of Laws with the Provisions of Other Countries, and therefore it was regulated there that without reciprocity in judiciary relation no recognition is possible.

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[32] Knežević-Bojović, A. (2009). *op. cit.*, p. 246

[33] Jovanović-Zattila, M. Čolovic, V. (2007). *op. cit.*, p. 232; Rakić-Vodinelić, V. & Šarkić, N. et al. (2006). *op. cit.*, p. 110

This is actually also the biggest change made in the Insolvency law RS 2004, and which is of course held also in the new law. Insolvency law now stands in the relation to LRCL as lex specialis and it is to be consulted first when the thing from the insolvency field with foreign element has to be sold. In the end, both Croatian and Serbian legislator have chosen to no longer require reciprocity as a presumption for recognition of foreign insolvency decisions. This is an important step forward for the Serbian legislator, because up until the 2004 LBP RS, reciprocity was required by means of Art. 92 of the Law on Resolution of Conflict of Laws with the Provisions of Other Countries[34]. However this practice is outdated and no longer desirable (it is a one-sided act that resembles the principle of talion and which can be attributed with a vengeful character). This is especially true in the time when tendencies of harmonization of insolvency law are more frequent[35].

The problem in interpretation and application of this rule were not specific, rather they applied on the considerations common to the recognition of all foreign judicial decisions. The effects of the recognized decision on instituting insolvency proceedings were stipulated in Art. 164, whereby the recognized decision was equated with domestic decisions, nevertheless this was only declarative in nature, considering that were no provisions which would concern themselves with particular problems[36].

Compared to how LESBL regulated the matter of insolvency, all states formed in the region of former SFRY have significantly altered their legislations. Generally speaking, what they all have in common is that they have all introduced the procedures for reorganization and have further regulated the matter of international insolvency. Concerning the regulation of International insolvency, there are distinctions which are mostly rooted in the fact that some legislations

[34] Art. 92: Foreign judicial decision will not be recognized if there is no reciprocity. Non-existance of reciprocity is not an obstacle for recognition of foreign decisions in matrimonial disputes, as well as if the regocnition and enforcement of a foreign judicial decision is requeste by a Serbian citizen.
The existence of reciprocity in the view of recognition of a foreing judicial decision is assumed until proven otherwise, and in the case of doubt as to the existence of reciprocity, the explanation is that the federal organ is charged with matters of justice.

[35] Šarkić, N. & Stanivuk, B. (2007). *op. cit.*, p. 27

[36] Rakić -Vodinelić, V. & Šarkić, N. et al. (2006). *op. cit.*, p. 106

have modeled their insolvency laws upon UNCITRAL Model Law, and others upon The EU Insolvency Regulation, or Istanbul Convention.

Until the 2004 LBP came into force the 1989 LESBL was applied as a supplemental source of law to the Law on Resolution of Conflict of Laws with the Provisions of Other Countries ("Official Gazette of SFRY, no. 43/1982, 72/1982 and "Official Gazette of SRY 46/1996), and especially the provisions of this law contained in Arts. 87-96 which consider the recognition of a foreign judicial decision[37].

Both Serbian and Croatian insolvency legislation differentiate between the main and special insolvency proceedings.

As it is differentiated under EU Convention there are two types of insolvency proceedings. The main bankruptcy procedure is one that was open in the country of debtor's centre of main interests, the other, opened after the main bankruptcy in other Party to the Convention is the secondary bankruptcy. Secondary proceeding is one of two types of the special procedures, and the other type of special procedure is separate procedure. Separate procedure is not mentioned in EU Convention. But the Convention regulates that also, any debtor declared bankrupt by a competent court in the main bankruptcy proceedings may be, by the virtue of that fact, be declared bankrupt in other Parties. It is assumed that the center of debtor's interests is the Party where the debtor is registered, if the debtor is a legal person. If we consider the secondary bankruptcy proceedings in the Party where the debtor does not have a main centre of interests, the effect of the proceedings are limited to the property situated in the Party where that proceeding has been instituted[38].

Which proceedings will be instituted relies solely on how closely the insolvent debtor is connected with the domestic country, that is to where the centre of his main interests is located[39]. We should however differentiate between two types of special insolvency proceedings: a) Separate insolvency proceedings which can be instituted both before and after the institution of the foreign main insolvency proceedings and are unrelated to it, and b) secondary insolvency proceedings which assume that the foreign main

[37] *Ibid.*, p. 107
[38] Jovanović-Zattila, M. Čolovic, V. (2007). *op. cit.*, p. 225
[39] *Ibid.*, p. 233

insolvency proceeding is already instituted and recognized, and which are, as a rule subordinated to it[40].

It is worth noting that every country has its own system of founding legal persons, and also its own rules according to which it determines the national affiliation of legal persons[41].

Competent court for the recognition of foreign insolvency proceedings

LBP RS also prescribes the jurisdiction of the court regarding the application of LBP RS provisions concerned with the recognition of foreign insolvency decisions (Art. 150). Both LBP RS and the new LB RS have decided not to regulate the question of exclusive jurisdiction of domestic courts, unlike the BL RC[42].

After the main foreign insolvency proceeding is recognized in Serbia, both LB RS (Art. 199) and LBP RS (Art. 174) allow for institution of secondary insolvency proceedings in Serbia with the only condition being that the insolvent debtor has assets in Serbia. This is substantially different from other sources regulating International Insolvency, including Croatian BL RC (Art. 302)[43]

Concerning the procedure of recognition of foreign insolvency proceedings, as we have already mentioned, there are two modalities: 1) Automatic (or ex lege) recognition, and 2) formal procedure of recognition. Both Serbian and Croatian legislator have opted-in for the formal procedure of recognition[44].

Art. 146 of LBP RS and Art. 174 LB RS prescribe the scope of application of the rules of International Bankruptcy which are effectively the same with the notable exception that LBP RS instead of stating when the provisions of that Chapter apply states that the insolvency proceedings with international elements are conducted when:

(1) Assistance is sought by a foreign court or a foreign representative in connection with a foreign proceeding; or

2) Assistance is sought by a foreign State in connection with a proceeding in accordance with this Law; or

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[40] Šarkić, N. & Stanivuk, B. (2007*). op. cit.*, p. 25
[41] Jovanović-Zattila, M. Čolovic, V. (2007). *op. cit.*, p. 235
[42] *Ibid.*, p. 237
[43] *Ibid.*, p. 247
[44] Šarkić, N. & Stanivuk, B. (2007). *op. cit.*, p. 25

(3) A foreign proceeding and a proceeding in accordance with this Law in respect of the same debtor are taking place concurrently; or

(4) Creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participating in, a proceeding under the provisions of this Law

They both go on to define what exactly a foreign insolvency proceeding is: "Foreign proceeding, within the meaning of this law, shall mean a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court or other appropriate body for the purpose of reorganization or compulsory or voluntary liquidation". We can see that the Serbian legislator meant on insolvency proceedings or other proceedings equivalent to an insolvency proceeding instituted in another state.

If we carefully analyze we may see that the certain presumptions and documentation are needed in order to recognize the foreign court decision (Art. 161 BLP RS, Art. 182 BL RS) and that was actually the case also in previous law (Art 87 LRCL), but now it is done in a more detailed way.

Filling the request for recognition of foreign insolvency proceedings and necessary documentation

In order to enable domestic court to decide about the recognition of foreign insolvency decision in foreign procedure, certain documentation is needed to be submitted, as a proof that the judicial procedure took place and started in the foreign country. To domestic – national court the request for recognition of a foreign court decision on insolvency is submitted, or in other words the decision about starting the insolvency procedure. The request is submitted with the all additional documentation, as well as with notification to the domestic court if there is any other procedure commenced-started in the foreign country considering the debtor, which should be known to the foreign representative[45]. The foreign representative submits one of the following documents:

[45] Jovanović-Zattila, M. Čolovic, V. (2007). *op. cit.*, p. 241

1. authenticated copy of the decision instituting insolvency proceedings abroad which contains decision about the nomination of a foreign representative;

2. the approval of the foreign court about the beginning of the procedure and about naming of the legal representative

3. some other proof about the starting of the procedure and naming of the foreign representative.

Domestic court may request that the needed documents be submitted in the national official language, or in the language of the court by which the decision would be made (Art. 161 LBP RS). LBP RS states explicitly about the recognition of the foreign procedure and from the analysis of the law it is clearly visible that it deals with the recognition of the foreign decisions, first of all the one of the opening the insolvency procedure as the most important. Of course that does not exclude the possibility of recognition of the other decisions linked with the insolvency procedure, and in the same time it means the possibility for the other measures to be taken by the domestic court in order to protect the property of the insolvent debtor or the interests of creditors[46].

According to Art 162(2) of LBP RS The domestic court may accept the documents even though they are not authenticated, if it considers them to be valid as they are authenticated.

Legislator defines that as a centre of main interests of the insolvent debtor would be defined seat or residence - if the debtor is natural person, if something opposite is not proven. This mean that foreign insolvency procedure would be recognized if it fulfills the conditions linked to the procedure itself, foreign representatives, requests which are to be submitted with the necessary documentation, as well as competency in the sense that the request for the recognition of the foreign insolvency procedure has to be submitted to the court which could obtain jurisdiction. Otherwise foreign insolvency procedure would be recognized whether as the main or secondary, in accordance with its performance which are requested under the Insolvency law[47].

For the recognition of foreign procedure about instituting of the insolvency proceedings in Croatia the Commercial court on whose

[46] Šarkić, N. & Stanivuk, B. (2007). *op. cit.*, p. 26
[47] Jovanović-Zattila, M. Čolovic, V. (2007). *op. cit*., p. 242

territory the operational unit or the assets of the insolvent debtor are located is in charge[48].

The additional documentation which should be submitted to the Croatian court is the following, beside the request for recognition:

1.The original or authenticated copy of the decision, or the authenticated translation into the Croatian language

2. certification of the relevant foreign body about the enforceability of the decision

3. the signatures of the creditors along with suitable evidence

Croatian court would have to state precisely while issuing the decision about the recognition of a foreign court decision also the effects which recognized decision might provoke. That is important, since sometimes, when it is useful, as an effect determines the opening of the secondary procedure on the territory of Republic Croatia.

This kind of confirmation is normally going to be published in the Official Journal RH, but it should be also submitted to the person who proposes the procedure.

It is important to notice that in each and every law the legal order is the most preventing factor for a decision to be recognized, if it does not fall under the scope of what the legal order expects, since it is not possible to recognize the decision if it is opposed to legal order neither by Croatian current law, nor Serbian current or any other previous law, which dealt with the matter of insolvency.

Keeping public order as an presumption for recognition

The obligation to respect the domestic legal order is made in order to ensure that if some action, which should be done and is linked with insolvency procedure on the domestic territory, is not in accordance with public legal order of the country in question, then the domestic court should negate to provide such an action according to Art. 152 LBP RS / Art. 179 LB RS. Respect of the legal public order is foreseen under the conditions for the recognition of foreign decisions. Legal public order is determined by the highest legal acts in each and every state. The norms of the public order present in the hierarchy the highest norms and principles that are made in one state –

[48] Šarkić, N. & Stanivuk, B. (2007). *op. cit.*, p. 28

but unfortunately it is not always easy to determine exactly what the legal public order encompasses[49].

LBP RS explicitly states that the court is capable and able to deny performing any of the actions established by this law, if such kind of act would be in discordance with public legal order of RS. It is clear that the whole concept of constitutional and legal order is structured in that way in the both of jurisdictions analyzed.

It should be investigated whether in the right or wrong way the application of procedural or substantive law has been made and whether the effects of such a decision would be opposite with the foreign legal order. More often we have the situation that because of this reason some of the effects of the foreign decision are negated but that the decision itself is approved. The one and only problem we are inevitably facing when dealing with this is that the notion of public legal order itself is pretty much abstract and indeterminate in a clear and precise way. Also Croatian law posts as one presumption for the recognition of foreign insolvency decisions that the rules are not in conflict with the public legal order (BL RC Art. 311(3))[50]

Regarding the concept the centre of debtor's main interests, some legislations might give preference to the registered seat of the debtor and others might give preference to the factual, for instance Serbian legislator gives preference to the factual.

Faced with such reality it is possible that a insolvent debtor might have a factual seat in a country that is not familiar with this criterion and that, for instance, his registered seat in Republic of Serbia. It should be accepted that in such a case a court of Republic of Serbia would be competent for initiating the main insolvency proceeding[51].

A foreign representative has a right of direct access to courts of RS, which establishes the jurisdiction of the specific court only in the matter of deciding upon the request of the foreign representative. Domestically appointed insolvency administrator in accordance with the provisions of LBP RS has the right to perform actions in a foreign country, if he is allowed to do so by the law of that country On the

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[49] Art. 91, LRCL: Foreign court decision will not be recognized if it is in conflict with the foundations of civil society which are determined as such by the Constitution of SRY.

[50] Šarkić, N. & Stanivuk, B. (2007). *op. cit.*, p. 27

[51] *Ibid.*, p. 28

other hand it is evident that even if under the law of a foreign country jurisdiction to conduct an insolvency proceeding has some organ other than the court of that country, there will be no impediments for recognition of such decisions even though in Serbia only courts have the jurisdiction to institute and conduct insolvency proceedings[52].

Concerning Croatian Law, there are three fundamental presumptions for the recognition of a foreign decision instituting insolvency proceeding:

1) if it has been issued by a court or other body which has, according to Croatian laws,

international authority,

2) if according to the law of the state where the decision has been issued, the decision may be executed,

3) if the recognition of this decision would not be contrary to the public order of the Republic of Croatia.

Croatian Insolvency legislation foresees a principle of indirect international jurisdiction of a foreign court if the seat of business activities of the insolvent debtor is located in the territory of that foreign state.

The mention of business activities suggest that it is in fact the factual seat of the insolvent debtor that is considered, however, Croatian law construes it as the registered seat. This is a presumptio iuris tantum because a different solution would devalue the legislators objective of conducting the insolvency proceedings by the court located where there is the greatest number of creditors, in other words where the debtor really conducts his business. In case a special insolvency proceeding was instituted in a country on whose territory the debtor only has his some or all of his assets, Croatian legislator has foreseen the possibility of recognition of the decisions from such proceedings even when the main or special insolvency proceeding was instituted in the Republic of Croatia against the same debtor.

The second presumption – that the foreign decision is enforceable, means that the decision actually produces legal effects in the country it was rendered. We should notice that here we cannot afford to wait for the validity of the decision, since that would leave a lot of space for abuse by the debtor which could end up harmful for his creditors[53].

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[52] *Ibid.*, p. 26
[53] *Ibidem*

Examination of presumptions for recognition of decision instituting insolvency proceedings – special formal procedure

Both Croatian and Serbian legislator have selected to use the formal procedure of recognition, which is considering the type of proceedings and seriousness of its consequences, a very good solution. Next important step is determining which court has the jurisdiction to perform recognition of foreign decisions (LBP RS – Art. 150).

Regarding the formal requirements for documentation attached to the request for recognition of a foreign decision Croatian legislator has decided to require all conditions to be fulfilled cumulatively, while Serbian legislator allows for alternative filing of any of the three possible proofs about the existence of the foreign insolvency proceedings. The proceedings might be recognized in both legislations as either main insolvency proceedings or special.

Both Croatian and Serbian legislator have given much significance to the urgency of the procedure, since stalling could seriously endanger the prospects of the creditors. Again, in accordance with UNCITRAL Model Law Serbian legislator provides the possibility of providing aid until a final decision has been reached. Such aid includes the suspension of enforcement on debtor's property that is located in Republic of Serbia. However the court might deny providing aid if it determines that providing such aid would interrupt the conduct of the main foreign proceeding.

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LL.B. Lidija Pejčinović,

KOMPARATIVNA ANALIZA PRIZNAVANJA STRANIH ODLUKA U POSTUPCIMA INSOLVENTNOSTI U HRVATSKOM I SRPSKOM PRAVU

This paper will comparatively consider and analyze presumptions for recognition of foreign decisions instituting bankruptcy/insolvency proceedings in Croatian and Serbian law, in order to see and determine the differences made in insolvency proceedings of those two states. We chose to go through those two jurisdictions since they both formed different approaches, after the disintegration process of SFRY, in their insolvency rules, when each state obtained its independence. We would also like to pay attention here to the relations of aforementioned laws and the way they were influenced by relevant legal documents considering comparative insolvency law approach, such as European Regulation on Insolvency Proceedings and UNCITRAL's Model Law on Cross-Border Insolvency, and to try to determine the reasons why two neighboring countries which shared similar historical development through five decades of the 20th century, are now developing completely opposite notions of adoption of insolvency law institutes and what factors were influential in this process. We would try to point out advantages and disadvantages in application of these laws especially in the field of presumptions for recognition of foreign decisions instituting bankruptcy/insolvency proceedings in Croatian and Serbian law, since trying to deal with the bigger amount of data would be inappropriate for the concept of this work, but we will try to put all that in the European framework and actual international framework of laws and regulations made in the field of insolvency law.

***Key words**: insolvency, presumptions for recognition of foreign decisions, comparative legal analysis, Croatia, Serbia, European Regulation on Insolvency Proceedings, UNCITRAL's Model Law on Cross-Border Insolvency*