

LEX FORI CONCURSUS AS THE BASIC RULE IN THE INTERNATIONAL BANKRUPTCY

Abstract

The rule lex fori concursus determines the law of place of the initiation of the bankruptcy proceeding as a law to be applied in these proceedings, i.e., that is the law of head office or branch of bankruptcy debtor or of the place where we can find debtor's assets. Lex fori concursus is used as a basic rule of international bankruptcy, with which explains the conduct of the main and more secondary bankruptcy proceedings against the same debtor, as well as the interdependence of these proceedings. However, the Regulation 848/2015 on insolvency proceedings provides for the possibility of avoiding initiation of secondary bankruptcy proceedings. Then, creditors, charge their claims in the special proceedings which are not secondary bankruptcy proceeding. The trustee from the main bankruptcy proceeding decides about that. Also, the Regulation 848/2015 on insolvency proceedings provides for the possibility of initiation of bankruptcy proceeding against the member or members of affiliated companies. The paper explains the status and application of the rule lex fori concursus in these cases. Attention is paid to the application of this rule in the Model Law on Cross-Border Insolvency (UNCITRAL).

Keywords: *international bankruptcy, lex fori concursus, main bankruptcy proceeding, secondary bankruptcy proceeding, affiliated companies.*

1. General information on the status of lex fori concursus in the international bankruptcy

International bankruptcy or bankruptcy proceedings with a foreign element implies the connection of the debtor, its assets and creditors with another country other than the one in which the bankruptcy proceedings have been instituted, and/or other than the country in which the debtor has its registered office, i.e., in which it performs the main business activity. It means that the bankruptcy proceedings will include a foreign element when the debtor's assets in whole or in part are located abroad or when the debtor or creditors are persons

¹ Principal Research Fellow, Institute of Comparative Law, Belgrade; mail: vlad966@hotmail.com

holding a foreign citizenship, and/or when they are seated or residing abroad. There are two conflicting interests here. First, there is the interest of the country where the assets are located. That country tends to keep the assets in the national territory for the settlement of domestic creditors while eliminating foreign ones. Secondly, there is the interest of the country of establishment i.e., the registered office of the debtor (the country in which the bankruptcy proceedings have been instituted). That country tends to encompass all the debtor's assets, to accumulate the debtor's assets, regardless of where they are located.

With respect to the international bankruptcy when there exists the principle of integrity of the bankruptcy proceedings and the bankruptcy estate, there is an issue of enforcement of applicable law, since the implementation of the said principle is subject to conducting several bankruptcy proceedings against the same debtor as well as ensuring that these proceedings produce the effects in the country where the other bankruptcy proceeding is conducted. The most important rule applied in this field is the rule (the linking point) *lex fori concursus*, which defines that the bankruptcy proceeding shall be subject to the application of the right to institute and conduct the proceeding, and/or the right of the place of initiation and conducting of such proceeding, and/or the right to the place related to the debtor through its registered office, its branch office or its assets. *Lex fori concursus* ensues from the doctrine of domicile that accepts the integrity of the bankruptcy proceeding as the basic principle of that proceeding. This doctrine is based on the domicile of the debtor, regardless of how it will be defined, as the registered office, the principal place of business or otherwise². However, the domicile can be regarded as the place where the debtor's branch office is located. Otherwise, the doctrine of domicile is a product of the English theory of law, but it has never been part of the English law and practice³.

In order to speak about the integrity of the bankruptcy proceedings in general, it must be taken into account that the bankruptcy proceeding must be comprehensive, which means that it must encompass the whole assets of the debtor so that the bankruptcy proceeding is "successful", i.e., so that the creditors' claims are settled. However, when determining the domicile of the debtor there may arise problems that actually consist of determining where the debtor has its registered office or principal place of business, as the integrity of the bankruptcy proceeding and the integrity of bankruptcy estate require determining of the place where the debtor performs its business activity or where its assets are located. If *lex fori concursus* should ensure the integrity of the bankruptcy proceeding and bankruptcy estate, then all the elements constituting such integrity should be taken into account⁴, and this does not relate only to the registered office or the

² V.Čolović, „Međunarodni stečaj u domaćem i uporednom pravu“, *Strani pravni život* br. 1-3/2001, Beograd 2002., 108

³ G.C.Cheshire and P.M.North, *Private International Law*, London, Butterworths 1979., 561

⁴ V.Čolović (2002), 99

principal place of business. If the said rule was linked to those two places, then this rule would explain the exclusive competence for initiating the bankruptcy proceeding, other than the integrity of bankruptcy proceeding and bankruptcy estate. However, the possibility for conducting several bankruptcy proceedings against one and the same debtor, out of which one will be the main bankruptcy proceeding and the other secondary bankruptcy proceeding, must be explained by applying *lex fori concursus*. This rule will also explain the possibility that a liquidator appointed in the main bankruptcy proceeding initiates actions in the secondary bankruptcy proceeding. This applies also to the influence of the main bankruptcy proceeding on the initiation of the secondary proceeding, transfer of bankruptcy estate assets from the secondary bankruptcy proceeding to the main proceeding, possibility that the creditors from the country in which the main bankruptcy proceeding has been initiated are settled their claims in the country in which the secondary bankruptcy proceeding has been initiated, etc.

However, within the amendments to the act under the EU law governing bankruptcy proceedings⁵, there has been a change in understanding the rule *lex fori concursus*. Namely, the possibility of not initiating the secondary bankruptcy proceeding in spite of legal grounds as well as conducting bankruptcy proceeding against affiliated companies, has defined a different meaning of the said rule. This paper will try to answer three questions regarding the status *lex fori concursus* in the international bankruptcy. These questions are as follows: 1. Taking into account the basic meaning of the rule *lex fori concursus*, can it be said that it is the basic rule in the field of international bankruptcy and that it ensures the integrity of the bankruptcy proceeding and bankruptcy estate? 2. Must *lex fori concursus* be regarded separately for each bankruptcy proceeding, the main and secondary proceeding and can we speak about the comprehensive character of that rule in that case? 3. Finally, do the optional nature of initiating the secondary bankruptcy proceeding (in accordance with the new act in the EU) and discretionary rights of liquidators in case of conducting bankruptcy proceeding against affiliated companies annul the initial significance of the rule *lex fori concursus* and link it only for the cases when the main and secondary bankruptcy proceedings are conducted simultaneously against one and the same debtor?

2. Concept of universal character of bankruptcy and *lex fori concursus*

The essence of the concept of universality refers to the possibility of conducting several bankruptcy proceedings against the same debtor simultaneously, in such a manner that the open bankruptcy proceeding in one country is recognized in all countries in which such proceeding has effects⁶.

⁵ In 2015.

⁶ B.Eisner, *Međunarodno privatno pravo*, Zagreb 1956., 368

The most important element of this concept is the rule *lex fori concursus*. But the universality concept has certain limitation in its applications. Namely, the limitation relates, in particular, to the debtor's immovable assets located outside the country in which the debtor has its registered office, principal place of business, and/or in which it conducts its main business activity⁷. Apart from the concept of universality, there is also the concept of territorial character which is more conservative and which is characteristic for regulating international bankruptcy in the past⁸. It is the concept that limits the effects of the bankruptcy proceeding only to the country in which the proceeding has been initiated and if the debtor has assets in other countries, then the following situations are possible. First, it is possible to request enforcement on the assets located in another country based on already adopted decision. There are two possible types of decisions. The first decision is the decision on the initiation of the bankruptcy proceeding, when such decision is enforced in the territory of another country in view of collecting the debtor's assets for the purpose of constituting the bankruptcy estate, when such assets will be transferred to the country in which the bankruptcy proceeding has been initiated based on the exclusivity basis. The second decision is the decision on the conclusion of the bankruptcy proceeding, when such decision will be enforced in the territory of the other country, again, for the purpose of collecting the bankruptcy estate from which the creditors' claims will be settled in the subsequent division of assets. In addition, it is possible to initiate the secondary (specific, dependent) bankruptcy proceeding on the debtor's assets located in the territory of another country⁹. It is the secondary bankruptcy proceeding that contributes to the implementation of the rule *lex fori concursus* and the concept of universality, which should result in the integrity of the bankruptcy proceeding and the bankruptcy estate and the enforcement of one right¹⁰.

The principle of bankruptcy universality is defined by the international bankruptcy in the last 25 years. This principle defines the status of a foreign bankruptcy decision and all its effects. This principle is also found in international legislation systems as well as in the international sources, such as acts adopted within the EU and within the UN Commission on International Trade Law (UNCITRAL). Finally, this principle and the implementation of the rule *lex fori concursus* are found in the USA legislation, where other institute is used – the institute of *comity*, which explains that principle. The institute of *comity* explains the recognition of a foreign bankruptcy proceeding by the need for international politeness. Namely, the USA Insolvency Code in Chapter 15 regulates subordinate or accessory and other cross-border cases of bankruptcy proceedings. In this

⁷ H.Hanisch, „Probleme des internationalen Insolvenzrecht“ in *Probleme des Internationalen Insolvenzrecht Festschrift für W. Marschal*, Frankfurt 1982., 12

⁸ V.Čolović, *Međunarodni stečaj*, Istočno Sarajevo 2005., 36

⁹ H.Hanisch, 12

¹⁰ J.H.Dalhuisen, *International Insolvency and Bankruptcy*, vol.I, New York 1984., 3-170

field, the USA bankruptcy legislation applies the Model Law on cross-border insolvency¹¹. However, some authors define the institute of *comity* correctly, other than by means of international politeness. They define that the purpose of conducting several bankruptcy proceedings against one and the same debtor is to prevent the loss of assets located in the branch offices of the company against which the bankruptcy proceeding has been initiated¹². Based on the above, in its essence this institute is close to the meaning of the rule *lex fori concursus*.

3. *Lex fori concursus* and *lex fori*

If *lex fori concursus* is regarded as the rule ensuring the enforcement of one right in the bankruptcy proceeding, and/or bankruptcy proceedings against one and the same debtor, it must be said that it ensues from the rule *lex fori*, as the rule of place and there arises an issue of the place in which the court or other authority adopts a decision. If it is regarded *lex fori*, then it can be said that the rule governs the exclusive competence defined based on the registered office or principal place of business of the debtor and based on which the main bankruptcy proceeding is initiated¹³. If *lex fori concursus* ensues from the rule *lex fori*, then it can be concluded that *lex fori concursus* is the rule of the main bankruptcy proceeding and the issue is raised why this rule is the basic element by which the principle of integrity of the bankruptcy proceeding and bankruptcy estate is defined. This issue can be explained only if the relationship of the main and secondary (or several secondary) proceeding is considered. Namely, the secondary bankruptcy proceeding is initiated without considering the bankruptcy of the debtor in the other country-contracting party¹⁴. However, the secondary bankruptcy proceeding can be initiated without initiating the main proceeding, and such proceeding is called particular proceeding¹⁵, which will not be paid particular attention. The dependence of the secondary proceeding on the main bankruptcy proceeding is reflected not only in the effects but in the settlement of creditors' claims as well as in the actions of the liquidator under the main bankruptcy proceeding and/or in his actions that he may perform in the secondary bankruptcy proceeding, based on the decision on the initiation of the main bankruptcy proceeding. This also applies to

¹¹ L.Salafia, „Cross-Border Insolvency Law in the United States and its application to Multinational Corporate Groups“, *Connecticut Journal of International Law*, vol.21, 2006., 20

¹² J.N.Saltzman, Cross Border Insolvencies and the United States Bankruptcy Code, <http://lawfirm.ru/article/print.php?id=3773>, 01.11.2016.

¹³ Art. 3.1 Regulation 848/2015

¹⁴ Art. 34 Regulation 848/2015

¹⁵ J.Garašić, „Posebni tzv. partikularni stečajni postupak u hrvatskom pravu“, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* v. 33, br. 1, 85-108 (2012), Rijeka 2012., 87

the transfer of bankruptcy estate assets from the secondary to the main bankruptcy proceeding. As regards applicable law, applicable law as per *lex fori* is applied in the secondary proceeding¹⁶. Therefore, applicable law of the country in which the secondary bankruptcy proceeding is initiated will be applied. But, it can be said that applicable law to be applied in the secondary bankruptcy proceeding will also be determined as per *lex fori concursus* and the same result, and/or right will be achieved, or exercised, respectively.

4. Regulating *lex fori concursus* in the EU act – case when the secondary bankruptcy proceeding is not conducted

The act regulating, among other things, the application of the rule *lex fori concursus* in the international bankruptcy is the Regulation (EU) no. 848/2015 of the European Parliament and Council of 20 May 2015 on the proceeding in case of insolvency (hereinafter referred to as: the Regulation 848/2015)¹⁷, which differently regulates the secondary bankruptcy proceeding than the previous Regulation no. 1346/2000 of the European Parliament and Council on insolvency proceedings¹⁸ and which envisages the possibility of avoiding the initiation of that proceeding with the settlement of creditors' claims in the country in which the proceeding should be initiated. Namely, it relates in the first place to assuming liabilities in case of avoidance of the secondary bankruptcy proceeding. In accordance with the provisions of the Regulation 848/2015, a liquidator appointed in the main bankruptcy proceeding assumes unilateral obligation when it comes to the assets located in a member state in which the secondary bankruptcy proceeding might be initiated, to act in accordance with the law of that country, the country in which the secondary bankruptcy proceeding might be initiated during distribution of the said debtor's assets and income generated by such assets. By such obligation it is practically guaranteed that creditors will have all the rights as if the secondary bankruptcy proceeding were initiated. When it comes to the obligation assumed by the liquidator under the main bankruptcy proceeding, it can be said that it is the guarantee that the creditors will be settled their claims. We are interested in the fact that the creditors' rights regarding collection of claims are subject to the law of the country in which the secondary bankruptcy proceeding could be initiated (*lex fori*), while the definition of the debtor's assets will be connected with the issuance of the

¹⁶ Art. 35 Regulation 848/2015

¹⁷ Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings - *Official Journal of the European Communities*, L 141, 05/06/2015, pp. 19-72

¹⁸ Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings - *Official Journal* L 160, 30/06/2000 pp. 1 – 18

guarantee. This paper will not consider the procedure for the issuance of the guarantee or the issuance of approvals by local creditors. Instead, it will try to analyse on the one hand the application of law as per *lex fori* to the said actions and the role of a liquidator appointed in the main bankruptcy proceeding on the other. Namely, *lex fori concursus* as the bankruptcy proceeding law includes the possibility that a liquidator appointed in the main bankruptcy proceeding performs the actions in the country of initiation of the secondary bankruptcy proceeding. In accordance with the provisions of the Regulation 848/2015 this rule gives the right to the said liquidator to take other actions that are not related to the secondary bankruptcy proceeding. If the role of the liquidator appointed under the main bankruptcy proceeding is considered in this light, then it must be concluded that *lex fori concursus* has an advantage compared to *lex fori* of the secondary bankruptcy proceeding. Regulation 848/2015 upholds this. Namely, it may happen that the secondary bankruptcy proceeding is initiated anyway, although the liquidator appointed in the main bankruptcy proceeding has started to take actions related to the issuance of guarantees, under which he will be authorized to transfer the assets transferred from that country to another to the liquidator appointed in the secondary bankruptcy proceeding. Practically, the liquidator appointed in the main bankruptcy proceeding administers the debtor's assets all the time. There is an interesting provision of the Regulation 848/2015 stipulating that a liquidator appointed under the main bankruptcy proceeding is obliged to inform all creditors in the territory of that state on the distribution of the assets that must be in accordance with the guarantee and applicable law (*lex fori*) of the country in which the secondary bankruptcy proceeding might be initiated, and if this is not the case each local creditor may dispute such distribution before the court of a member state in which the main bankruptcy proceeding has been initiated. Therefore, a creditor from the country in which a secondary bankruptcy proceeding may be initiated may exercise its right in the country in which the main bankruptcy proceeding has been initiated. It ensues from this that the rule *lex fori concursus* should be regarded as the law of the main bankruptcy proceeding although it is not the case as per other provisions relating to the application of law in the secondary bankruptcy proceeding.

Anyway, the possibility of avoiding the initiation of the secondary bankruptcy proceeding arose from the term “synthetic” bankruptcy proceeding, created in the United Kingdom, when in some cases it was established that secondary bankruptcy proceedings unnecessarily burdened the whole bankruptcy proceeding against the debtor. There arose the issue of the protection of local creditors to include the tax administration, social insurance agencies and other persons that had to be issued the guarantee when

it came to collection of claims in the main bankruptcy proceeding¹⁹. But then there is an issue of protection of foreign creditors in these proceedings, which must have a universal character since claims can be reported in both proceedings (both in the main and in the secondary proceedings, while the “synthetic” bankruptcy proceeding relates to, in the first place, to the protection of status of local creditors²⁰. It can be said that *lex fori concursus* has its place in this case as well, since local creditors must be protected in any case. The universal character of these cases ensues from such protection, since the secondary bankruptcy proceeding will be initiated if the creditors’ claims are not settled in accordance with the guarantee.

5. Bankruptcy Proceedings Against Affiliated Companies and *lex fori concursus*

The bankruptcy proceeding may be conducted against affiliated companies as well subject to provisions of the Regulation 848/2015 and certain national legislation, but this paper will not pay attention thereto. The Regulation 848/2015 defines affiliated companies in a simple way, leaving space for interpretation, which in our opinion is not good when provisions on international bankruptcy are applied. Namely, this act defines affiliated companies as members of trading companies group that consists of a parent company and all daughter companies²¹. The Regulation 848/2015 here ends the definition of the term of affiliated companies²². In case of conducting the bankruptcy proceeding against affiliated companies please note that this does not refer to bankruptcy proceedings conducted against all members of that group, against all affiliated companies, but against one affiliated company or several affiliated companies. Also, this mostly refers to the cooperation of liquidators and courts, but note that this does not refer to the cooperation between liquidators and the courts where the

¹⁹ E.T. Mendiola, “Synthetic” insolvency proceedings“, *Analysis Gomez-Acebo&Pombo*, November 2015.,

1, <http://www.gomezacebo-pombo.com/media/k2/attachments/synthetic-insolvency-proceedings.pdf>, 31.10.2016

²⁰ E.T. Mendiola, 1-2

²¹ Art.2, p.13 Regulation 848/2015

²² Insolvency proceedings: the new EU Regulation 2015/848, http://www.google.rs/url?sa=t&rct=j&q=&esrc=s&source=web&cd=8&ved=0CFUQFjAHahUKEwiK_6DLo7LHAhUMECwKHeMgCzk&url=http%3A%2F%2Fwww.legance.it%2F00651%2FDOCS%2FF-ENG_Newsletter_Legance.pdf&ei=bfXSVcqUB4yg-sAHjwazIAw&usq=AFQjCNGKNHsb1rcN_Y0zHfBpyBExXLt9A, 01.11.2015.

main and secondary bankruptcy proceedings are conducted²³. A liquidator in the proceeding initiated against one of the members of the group of affiliated companies is obliged to cooperate with the liquidator appointed in the proceeding conducted against the other member of the same group of affiliated companies, if this facilitates conducting of such proceedings, then if it is not contrary to the rules applied in these proceedings as well as if this does not result in the conflict of interests. In order to implement the above cooperation, an agreement or an adequate protocol of cooperation should be concluded between liquidators in the above proceedings. Please note that these are independent bankruptcy proceedings, other than the main and secondary bankruptcy proceeding²⁴. Please note the liquidator's authorizations due to the application of the rule *lex fori concursus*. A liquidator is entitled to make a statement in each of these proceedings conducted against members of affiliated companies. In addition, the liquidator may seek postponement in the enforcement of any measure relating to the disposal of assets. This applies also to the case of submission of the restructuring plan for all or only for some members of the group of affiliated companies. The liquidator is entitled to request the initiation of the coordination proceeding before any court exercising the competence for initiating the bankruptcy proceeding against members of the group²⁵. The application is filed in accordance with applicable law for the proceeding in which a liquidator has been appointed. The Regulation 848/2015 highlights the need to cooperation and communication between affiliated companies, by which it highlights interdependence of those companies, regardless of their legal autonomy. The provisions of the Regulation 848/2015 that apply to the members of groups of affiliated companies show that these are separate bankruptcy proceedings. However, the cooperation of liquidators and coordination between proceedings witness otherwise. These are companies under the relationship of dependence. The interesting thing, though, is that no provision relates to a parent and affiliated company, but only to members of the group. The fact is that *lex fori concursus* exists also in the case of bankruptcy of affiliated companies, as the rule defining international bankruptcy and the principle of universality. The affiliation of companies under any form of affiliation supports this, although these

²³ The procedures can be initiated against the same bankruptcy debtor, which are governed by the Regulation 848/2015, as well as by the earlier Regulation 1346/2000

²⁴ Anderson H., Oliver R., The recast EC regulation on insolvency (Regulation 2015/848 of 20 May 2015), July 2015, file:///C:/Users/Vlada/Desktop/clanci/848-15/The%20recast%20EC%20regulation%20on%20insolvency%20(Regulation%202015-848%20of%2020%20May%202015)%20%20Norton%20Rose%20Fulbright.htm, 30.10.2015

²⁵ Tett R., Crinson K., „The recast EC Regulation on Insolvency Proceedings: a welcome revision“, *Corporate Rescue and Insolvency*, Freshfields Bruckhaus Deringer, April 2015., 68 EY

are independent legal entities. On the other hand, the fact of coordination necessity supports the necessity of *lex fori concursus* application in such situations as well. Of course, there are limitations to the acceptance of the coordinator's plan, which is explained by the autonomy of those legal persons, but this does not impair the significance of *lex fori concursus* in any way.

6. *Lex fori concursus* and the Model-Law on cross-border insolvency

The Model Law on cross-border insolvency adopted by the UN Commission on International Trade Law (UNCITRAL) (here in after referred to as: the Model-Law)²⁶ governs the issue of integrity of the bankruptcy proceeding and bankruptcy estate differently than the Regulation 848/2015. Namely, the application of law as per *lex fori concursus* is identified here as well, but to a limited extent. That limitation is reflected in defining and the method of initiating an ancillary bankruptcy proceeding, which cannot be regarded as the secondary proceedings in terms of provisions of the Model-Law. We will present the provisions of the Model-Law that relate to the application of *lex fori concursus*. The principles of the national bankruptcy law and of the national legal system should be taken into account. The simplest way to do this is to define presumptions and/or requirements that a foreign decision must meet. The Model-Law defines that, upon recognition of a foreign decision on bankruptcy, the bankruptcy proceeding can be initiated in the country of recognition only if the debtor owns assets in the territory of that country and the decision adopted in that proceeding will apply only to the said assets²⁷. The Model-Law defines the initiation of the ancillary (particular, dependent) bankruptcy proceeding in relation to other sources governing international bankruptcy. Namely, the only requirement for the initiation of such proceeding is that the debtor has assets in the territory of the home country.

The Model-Law governs the coordination of two bankruptcy proceedings, the main and the ancillary one, as well. The coordination takes place in two situations. First, when the bankruptcy proceeding is already conducted in the home country at the time of filing the application for recognizing a foreign decision on bankruptcy. The coordination of both proceedings is conducted in accordance with provisions relating to providing assistance after recognition of a foreign decision on bankruptcy. The second situation is when the bankruptcy proceeding in the home

²⁶ General assembly resolution 52/158 of December 15, 1997 – Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law

²⁷ Art. 28 Model-law

country is initiated after filing the application for recognition of a foreign decision on bankruptcy. The provisions governing providing assistance after recognition of a foreign decision on bankruptcy will be applied also, but to a limited extent. Namely, a domestic court will deny this type of assistance if it is contrary to domestic law²⁸. The possibility of initiation of the ancillary bankruptcy proceeding, impact of a foreign decision on bankruptcy and the coordination of the main and ancillary proceeding represent the elements supporting the application of the right as *per lex fori concursus*. However, the impossibility of initiation of the ancillary bankruptcy proceeding based on the place of the branch office of the debtor gives rise to two questions. First, if the bankruptcy proceeding is initiated against the debtor in the country of establishment, and/or the place of registered office, will the proceeding have influence on the branch office located in another country? The answer depends on the status of the branch office in another country, and/or whether the legislation of that country will define the branch office as an independent legal entity or as a part of a parent company. Secondly, if the bankruptcy proceeding is initiated against the branch office located in another country, how will that proceeding influence the operations of the debtor in the country in which it is established, and/or in which it has a registered office? Such proceeding would be particular and it would be specific in relation to the country in which the debtor is established, but the Model-Law does not regulate such situation.

7. Conclusion – Is *lex fori concursus* the rule that defines the principle of integrity of bankruptcy proceeding and bankruptcy estate?

Notwithstanding the basic meaning of the rule *lex fori concursus*, as well as the fact that this rule, in accordance with provisions of the Regulation 848/2015 (and in accordance with regulations of the Model-Law), please note that the international bankruptcy relies on the application of *lex fori concursus*²⁹. This rule “explains” the relationship between the main and secondary bankruptcy proceeding, and their interdependence. Further, *lex fori concursus* can explain the purpose of initiating the secondary bankruptcy proceeding³⁰. However, if such proceeding is not initiated, does this mean that *lex fori concursus* will not be applied? Such conclusion could not be accepted since, in that case, the status of a liquidator appointed in the main bankruptcy proceeding ensures the disposal of assets of the debtor

²⁸ Art. 29 Model-law

²⁹ J. Israël, *European Cross-Border Insolvency Regulation*, Antwerpen-Oxford, 2005., 243

³⁰ J. Israël, 244

located in the country in which the secondary bankruptcy proceeding may be initiated. Further, the cooperation of courts and other bodies in these proceedings upholds this fact³¹.

On the other hand, why is it required to initiate a secondary bankruptcy proceeding at all? First of all, so that the local courts, and/or the courts of the country in which the business unit or debtor's assets have exercised competence over such facts. In that case, the secondary bankruptcy proceeding opposes to the cross-border "sovereignty" of the main bankruptcy proceeding in the country in which the facts giving rise to the initiation of the secondary proceeding exist³². In addition, the secondary bankruptcy proceedings protect creditors of the country in which the requirements for the initiation of such proceeding are met. The rules of bankruptcy proceeding by which the business capacity is limited or revoked to the debtor, by which disposal of assets representing bankruptcy estate is limited, as well as other rules guarantee the settlement of creditors' claims. The said "synthetic" bankruptcy proceeding is one of the solutions that could protect creditors on the one hand, while on the other hand it could speed up and make more efficient the bankruptcy proceeding by not conducting the secondary bankruptcy proceeding³³. However, the rules of the bankruptcy proceeding would not be applied then which may bring the creditors with lower claims into more unfavourable position.

We can say that in cases when the secondary bankruptcy proceeding is not initiated, the rule *lex fori concursus* comes to the fore. The role of a liquidator appointed in the main bankruptcy proceeding is reflected in the fact that the liquidator could not take certain actions in the country which is in any way related to the debtor (through the branch office or assets) and which is not the country of initiation of the main bankruptcy proceeding initiated based on the criterion of exclusive jurisdiction, without full application of this rule and the application of the principle of integrity of the bankruptcy proceeding and bankruptcy estate. The basic meaning of the rule *lex fori concursus* is the right of the place of initiation of the bankruptcy proceeding, which means that it is used as a rule in the initiation of a secondary bankruptcy proceeding. However, regardless of whether it is the main or secondary bankruptcy proceeding, the rule *lex fori* may also be applied when determining applicable law. Due to the difference between *lex fori* and *lex fori concursus*, when the latter has

³¹ P.Franzina, The new European Insolvency Regulation, <http://conflictflaws.net/2015/the-new-european-insolvency-regulation/>, 31.10.2016.

³² J.A.E. Pottow, „A New Role for Secondary Proceedings in International Bankruptcies“, University of Michigan Law School 2011, Texas International Law Journal, vol.46:579, 581, <http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1613&context=articles>, 30.10.2016.

³³ J.A.E. Pottow, 585

more specific meaning, it can be said that in case of conducting several bankruptcy proceedings against the same bankruptcy debtor, this rule has a wider application. If the main bankruptcy proceeding is initiated based on the criterion of exclusive jurisdiction, and/or based on the place of registered office or principal place of business of the debtor, then the effects of that proceeding should be justified in another country in which the assets or branch office of the debtor are located, whose status depends on the country in which it conducts its business operations. The rule *lex fori concursus* enables the effects of the main bankruptcy proceeding in another country but the law of the country in which the proceeding has been initiated is applied to the secondary bankruptcy proceeding. What is the basic element of the main bankruptcy proceeding with the effects on the territory of another country? It is the decision on the initiation of such proceeding that produces effects. It produces effects based on the rule *lex fori concursus*. A foreign decision on bankruptcy facilitates the actions of the liquidator appointed in the main bankruptcy proceeding, exercise of the rights of creditors from the country in which the said proceeding has been initiated and the dependence of the secondary on the main proceeding is defined, which is reflected in the transfer of bankruptcy estate assets from the secondary into the main bankruptcy proceeding. On the other hand, *lex fori concursus* would not have the said application if the principle of integrity of the bankruptcy proceeding, inseparable from the principle of integrity of bankruptcy estate, was not recognized.

Prof. dr Vladimir Čolović
naučni savetnik, Institut za uporedno pravo Beograd

LEX FORI CONCURSUS KAO OSNOVNO PRAVILO U MEĐUNARODNOM STEČAJU

Rezime

Pravilo *lex fori concursus* određuje da će se na stečajni postupak primenjivati pravo mesta pokretanja tog postupka, odnosno, pravo mesta stečajnog dužnika (sedište, filijala i imovina). *Lex fori concursus* se primenjuje kao osnovno pravilo međunarodnog stečaja, pomoću koga se

objašnjava vođenje glavnog i više sekundarnih stečajnih postupaka protiv istog dužnika, kao i međuzavisnost tih postupaka. No, u Uredbi (EU) br. 848/2015 o postupku u slučaju insolventnosti predviđena je mogućnost da se ne pokrene sekundarni stečajni postupak, kada se u toj državi namiruju poverioci van stečajnog postupka, a o čemu odlučuje stečajni upravnik iz glavnog stečajnog postupka, kao i mogućnost pokretanja stečajnog postupka protiv člana ili članova povezanih društava. U radu se objašnjava status i primena pravila *lex fori concursus* u tim slučajevima. Posvećuje se pažnja i primeni ovog pravila u Model-zakonu o prekograničnoj insolventnosti (UNCITRAL).

Ključne reči: međunarodni stečaj, *lex fori concursus*, glavni stečajni postupak, sekundarni stečajni postupak, povezana društva.