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CONSUMER BANKRUPTCY WITH A CROSS-BORDER ELEMENT IDEA, NORMS AND SOME DOUBTS

ABSTRACT

The tendency towards a harmonisation of procedural law in the European Union is increasingly stronger and gaining importance. It is achieved by reaching a consensus in overcoming differences between legal systems. The European Union is at present an alliance of 28 sovereign states aimed at establishing an area of freedom, security and justice. Moreover, that the European Union is a creation in statu nascendi is clearly visible in the current situation and the development trends of legal harmonisation in the field of international consumer insolvency law. Consumers are frequently travelling, buying abroad and entering into contracts with foreign credit institutions. As they move from one country to another and are employed in countries other than the one in which they reside, insolvency and debt relief at the cross-border/ international level is becoming more widespread, and more effective regulation is a necessity.

The aim of this paper is to point out potential problems in the regulation of consumer bankruptcy with a cross-border element that may occur in the case-law of the Croatian courts. In the analysis of the institute of consumer bankruptcy with a cross-border element through the solutions of the Regulation 1346/2000 and Regulation *2015/848 (recast) we used a methodological procedure which involves the study of domestic and foreign literature, relevant legal provisions, as well as an analysis of domestic and foreign legal practices.*

We consider it important to note that the framework of this paper does not allow a detailed analysis and that we are forced to limit ourselves exclusively to some aspects of the issue at hand.

Keywords: *consumer bankruptcy, cross-border element, forum shopping, American experience.*

1. INTRODUCTION

International insolvency law found its place and has been gaining importance in the legal system of the EU in the past few decades.[1]Efforts to create a legal document that would regulate the issue of international insolvency law began in the 1960s in

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1 Wessels, B., *International Insolvency Law*, Kluwer, Deventer, 2006, p. 355.

the European Economic Community and, thanks to the extraordinary efforts of the doctrine and case law, today we can say that the basic principles and rules are codified, which gives the parties of the insolvency proceedings with international element equal treatment and the possibility of realisation of their claims within the Union.[2]

From the perspective of Croatia, as one of the Member States, (consumer) insolvency law with an international element shares the same fate of the overall development of EU laws, while, at the same time, it reflects certain specific developmental characteristics. Therefore, bearing in mind the complexity of problems in this paper, we consider it important to analyse the genesis of the issue from the perspective of Croatian legislators.[3]

2. OLD BANKRUPTCY ACT AND THE PROVISIONS FOR INTERNATIONAL BANKRUPTCY

Although the need for expansion of passive bankruptcy ability on natural persons was recognised long ago, and the causes which pointed out this need did not come suddenly and unexpectedly, the whole process of implementation of consumer bankruptcy in the legal order of the Republic of Croatia from the institutional aspect was moving very slowly.[4] The adoption of the Bankruptcy Act in 1997[5] represented a radical change in how the bankruptcy proceedings were conducted. In all subsequent novels,[6] in varying degrees of success, the legislator tried to achieve functionalisation of bankruptcy law protection.[7] Although the issue of the bankruptcy law was not *terra incognita* in recent domestic legal history,[8]it should be noted that the rules of international bankruptcy are some of the youngest ones in the Croatian legal system, as they were introduced on January 1st, 1997. These provisions of international bankruptcy represented a modern and comprehensive

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2 More details in Virgos, M., Garcimartin, F., *The European Insolvency Regulation: Law and Practice,* Kluwer Law International, 2004, pp. 7-8. and Garašić, J., *Europska uredba o insolvencijskim postupcima,* Proceedings of the Faculty of Law in Rijeka, Vol. 26, No. 1, 2005, p. 260 *et seq.*

3 The subject matter was originally analysed in the paper, Bodul, D., Vuković. A., *Prilog raspravi o uvođenju potrošačkog stečaja: neka pitanja potrošačkog stečaja s međunarodnim / prekograničnim elementom*, *Hrvatska pravna revija*, no. 7/8, 2013, pp. 61-68.

4 Bodul, D., *et al., Kratka povijest potrošačkog stečaja ili još jedna nenaučena lekcija iz povijesti*, XI. Majsko savjetovanje, usluge i zaštita korisnika, Kragujevac, 2015, pp. 1067-1087.

5 Official Gazette, No. 44/96.

6 Bankruptcy Act, Official Gazette, No. 44/96, 29/99, 129/00, 123/03, 82/06, 116/10,25/12, 133/12 and 45/13 – hereinafter: old BA.

7 Bodul, D. *et al., Stečajno zakonodavstvo u tranziciji: komparativni osvrt, hrvatski izazovi i potencijalna rješenja,* Proceedings of the Faculty of Law in Split, Vol. 49, No. 3, 2012, pp. 633-661.

8 Bodul, D. *et al.,Pravno povijesni i poredbeno pravni prikaz razvoja stečajnog postupka*, Proceedings of the Faculty of Law of the University of Rijeka, Vol. 34, No. 2, 2013, pp. 911-941.

regulation of this legal matter. In regulating this demanding area, the legislator demonstrated an enviable systematic approach, placing the complex provisions of the bankruptcy proceedings with elements of internationality in Title X of the old BA, and divided them into seven sections. However, we have to be aware, as the doctrine points out, that the term "international bankruptcy" covers a much broader area than exclusively bankruptcy proceedings with international elements.[9] Therefore, Croatian legislation is one of the first that comprehensively and independently regulated the bankruptcy proceedings with an international element. In addition, one of the most important "novelties" from the reform of the bankruptcy law in 1997, compared to the earlier arrangement of the bankruptcy matter,[10] was the introduction of the institute bankruptcy proceedings on the assets of an individual debtor (sole trader and craftsman). It is difficult to say why the category of a consumer as a possible subject of bankruptcy was omitted from the old BA. However, the provisions relating to bankruptcy proceedings on the property of the individual and the provisions of international bankruptcy are some of the few provisions which were not significantly changed in all the novels of the old and even new BA.[11] This can be explained by the fact that these models of bankruptcies were rare and most of the provisions remained unpractised. *Exempli causa*, according to the legal opinion of the High Commercial Court of the Republic of Croatia, in the case of bankruptcy on the assets of a natural person who is not a sole trader or a craftsman, creditors who initiate bankruptcy can realise their legal rights by other legal means, but not through proposal for recognition of a foreign decision for opening bankruptcy proceeding with the legal effect of the opening of bankruptcy proceedings in the Republic of Croatia. Such foreign decision does not have all the prerequisites for recognition, because its recognition is contrary to the Croatian *ordre public* (Art. 311, par. 3 in conjunction with Art. 3, par. 1 of the old BA).[12] Thus, the application of the old BA in relation to bankruptcy proceedings with an international element on the property of natural per-

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9 Hrastinski Jurčec, L., *Međunarodni stečaj u hrvatskom pravnom sustavu*, Legislation and Practice - collection of reports presented at the Regional conference on insolvency, German Organisation for Technical Cooperation (GTZ) GmbH Open Regional Fund for South East Europe – Legal Reform, Banja Luka, 2008, p. 175 *et seq.*

10 We are referring to the Law on Forced Settlement, Bankruptcy and Liquidation, Official Gazette, No. 53/91 and 54/94.

11 Bankruptcy Act, Official Gazette, 71/15 – hereinafter: BA.

12 Decision of the High Commercial Court - 7770/07. Available on the website of the High Commercial Court: http://www.vtsrh.hr/index.php?page=conference&conf_id=2200&article_id=2211&lang=hr (12/11/2016). There are conflicting views, claiming that it is "... the magic word that lawyers (civilians and publicists, legislators and judges, practitioners and theorists) use when they cannot find a legal basis ...". Perović, S., *Sloboda uređivanja obveznih odnosa i javni poredak,* Proceedings of the Faculty of Law in Zagreb, Special Edition, Zagreb, 2006, p. 404.

son - consumer – has not determined the appropriate legal standards and certain interpretations related to the issue of consumer bankruptcy with international/ cross-border element will yet have to be established.

3. MEMBERSHIP IN THE EUROPEAN UNION AND THE OBLIGATIONS OF IMPLEMENTING REGULATION 1346/2000.

During a long period of time, the international effects of consumer bankruptcy law were regulated as part of international private and procedural law. By entering the EU and accepting the body of law and practice of the EU (the so-called *acquis communautaire*), the legal complexity of consumer bankruptcy with cross-border / international element imposed reasonable caution in the application of that institute. Namely, based on the principle of universality, according to which the legal effects of the bankruptcy proceedings should be recognised outside the country of its opening in the area of the European Union, the Council Regulation (EC) no. 1346/2000 of 29th of May 2000 on insolvency proceedings was adopted by the Member States, with the exception of Denmark, and it entered into force on May 31st, 2002.[13] The Regulation's rules on conflict of law replaced the rules of private international law in the field of bankruptcy law. It is not explicitly stated in its text, but only in the recital that aims to facilitate understanding and application of the text of the Regulation.[14] Two annexes (A and B) to the Regulation determine the national proceedings covered by the Regulation 1346/2000. The third Annex (C) determines the persons or bodies that act as liquidators. These Annexes form an integral part of the Regulation 1346/2000 and have been revised a few times.

In principle, for the purpose of this study, consumer bankruptcy with international element implies the bankruptcy process that is opened on the basis of primary jurisdiction - the centre of the debtor's main interests, for example, the residence of the debtor[15] and as such has a tendency to encompass the entire property of the debtor, both domestic and international. Only one main bankruptcy proceeding should be possible against the debtor.[16] Although there is no unique and

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13 Council Regulation of 29 May 2000 on Insolvency Proceedings (No 1346/2000/EC), [2000] OJ L 160, pp. 1-13) - hereinafter: Regulation 1346/2000.

14 Radović, V., *Osnovno koliziono pravilo u međunarodnom stečajnom pravu (lex foricon cursus) sa posebnim osvrtom na Uredbu o stečajnim postupcima,* Harmonius - Journal of Legal and Social Studies in South East Europe*,* Vol. 2, No. 1, 2013, p. 240.

15 In the Virgos-Schmit report, it is stated that in these constellations the COMI is the place of a natural person's habitual residence. Virgos, M., Schmit, E., *Report on the Convention on Insolvency Proceedings,* Annex 2 to G. Moss, I. F. Fletcher and S. Isaacs (editors), in: The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide (Oxford, Oxford University Press, 2002), par. 75.

16 Legislators should take into account that there are already some unpleasant examples of court cases involving individuals in cross-border insolvency proceedings - in particular, the Stojevic case (Case No.

unambiguous definition of the centre of the debtor's main interests,[17] the law applicable for opening, conducting and concluding bankruptcy proceedings is that of a Member State on the territory of which such proceedings were initiated ("the State in which the proceedings were initiated" or *Lex fori concursus*).[18] The term special bankruptcy proceeding involves the bankruptcy process that is open on the basis of some subsidiary jurisdiction, for example, the debtor's assets, and as such encompasses only the debtor's assets in the state of opening of these proceedings. Thus, the doctrine distinguishes two types of special procedures: particular and secondary proceedings. The term particular bankruptcy proceedings involves the special bankruptcy proceeding which does not presuppose the opening and recognition of a foreign main bankruptcy proceeding and which is completely independent of that proceedings. Particular bankruptcy proceedings can be opened both before and after the opening of a foreign main bankruptcy proceeding, if the latter is not domestically recognised. The term secondary bankruptcy proceedings involves special bankruptcy proceedings which presupposes opening and the recognition of a foreign main bankruptcy proceeding and is in this sense dependent on it. However, the rule is that it is subordinate to the main bankruptcy proceedings on the basis of the rules on co-operation and coordination between these two procedures. Secondary bankruptcy proceedings can be opened only after the recognition of a foreign main bankruptcy proceeding.[19] The doctrine indicates that a number of very different terms are used for these types of procedures in literature and in various regulatory instruments of international bankruptcy / insolvency.[20]

9849 of 2002, High Court of Justice in Bankruptcy, London, 20 December 2006). In this case, Mr. Stojevic, a Croatian national of Russian descent, was declared bankrupt in two courts in succession, on 27 March 2003 in England and on 28 January 2004 in Austria, both proceedings being the main insolvency proceedings. The annulment of the Austrian Bankruptcy Order removed the conflict of jurisdiction between the two European countries, England and Austria, but in this case, the centre of the debtor's main interests within the meaning of the European Insolvency Regulation, when the bankruptcy petition was filed, was actually in Austria and not in England. It took four years to resolve this matter legally, and the situation resulted in the annulment of the English Bankruptcy Order dated 27 March 2003 under Section 282 (1) (a) of the 1986 Act. The downside of this action meant that Mr. Stojevic, who had huge debts both in Austria and in England, and no assets in either country, escaped bankruptcy altogether. Viimsalu, S., *The Over-Indebtedness Regulatory System in the Light of the Changing Economic Landscape*, Juridica International, No. XVII, 2010, p. 225.

17 Fletcher, F. I., *Choice of Law Rules - The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide*, (eds. G. Moss, I. F. Fletcher, S. Isaacs), Oxford University Press, New York, 2009, p. 57.

18 Art. 4. Regulation 1346/2000.

19 Garašić, J. *op. cit.* note 2., p. 260 *et seq. Id., Posebni tzv. partikularni stečajni postupak u hrvatskom pravu,* Proceedings of the Faculty of Law of the University in Rijeka, Vol. 33, No. 1, 2012, p. 87 *et seq.*

20 *Ibid.,* p. 87 *et seq.*

3.1. The application of Regulation 1346/2000 *ratione territori*

The Regulation applies only to proceedings in which the Centre of main interests (COMI) (*„Le centre des interest principaux", „Als Mittelpunkt der hauptsächlichen Interessen"),* is situated on the territory of one of the Member States. A commonality of all solutions is that they are based on the principle of opening the main insolvency proceedings with the effects in the Member State in which the centre of business interests of the debtor is located, with the possibility of opening special procedures, of local character, in other EU Member States where the debtor has assets or establishment. Therefore, the fundamental principle of the Regulation is that insolvency proceedings opened in one Member State are automatically recognised in other Member States. However, this does not preclude the court of another Member State to initiate special insolvency proceedings against the same debtor if the conditions are fulfilled.[21] In the event that the centre of interest is located outside the EU, the Regulation has no effect of direct application and each Member State may apply its own rules of private international law or international bankruptcy law. However, when in some cases there are no bilateral or other agreements, the provisions of the Regulation can serve as a guide.[22]

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[21] Par. 16, Regulation 1346/2000.

[22] In this regard, an interesting case is Lavie v. Ran (406 B.R. 277 (S. D. Tex. 2009), *aff'd sub nom*. Lavie v. Ran (*In re* Ran) 607 F.3d 1017, 5th Cir. 2010) where the American court decided that the mere presumption in Section 15 of the Bankruptcy Code is not sufficient to determine the centre of the main interests of the debtor. In the previously mentioned case, insolvency administrator requested the recognition of the bankruptcy proceedings in Israel as the main insolvency proceeding. The debtor was an individual, a consumer, who had lived in the United States for ten years and was in the process of obtaining U.S. citizenship. The U.S. Supreme Court considered the decision of the Bankruptcy Court and agreed that the centre of main interests of the debtor is not Israel, but the place of his residence, in this specific case, the city of Houston. The decision of the lower court indicated that the "... statutes, cases, and interpretative materials of the European Union are also instructive. Hence, the court should consult the European Union's Convention on Insolvency Proceedings…. and the Report on the Convention on Insolvency Proceedings…" (Virgos-Schmit Report) "Bankruptcy court extensively analysed the COMI issue through an exhaustive comparison of COMI or COMI-equivalent case law in the EU, United States, and Israel" (Lavie, 406 B.R. p. 285). This Bankruptcy Court analysis found that the conditions set for the centre of main interests in each country are very similar (Lavie, 406 B.R. p. 285), and all have presumption that the centre of the main interests of the debtor is his residence (Lavie, 406 B.R. p. 285). The Israeli court has taken into account the following factors: a) the ownership of property abroad or lack of assets in Israel, b) possession of a U.S. passport and residence permit in the United States; c) a license for employment in the United States and d) the fact that the family lives abroad. This may indicate the presence or absence of strong ties with Israel. The High Court has welcomed the use of foreign legal sources of the lower court and found that such detailed analysis is uncontested and does not require any further explanation from the Higher Court (Lavie, 406 B. R. p. 285, 288). This case is interesting, because the American court applied foreign law in deciding the case of consumer bankruptcy with international element. It also points to the flexibility in determining the centre of main interests, taking into account the experience of other countries. What distinguishes the U.S. bankruptcy courts is the ability and the commitment that in the bankruptcy proceedings under Article 15 "…the court shall consider its international origin, and the need to promote an application

3.2. The application of Regulation 1346/2000 *ratione materiae*

The scope of application of Regulation 1346/2000 is also limited to certain models of bankruptcy proceedings. The Regulation is generally applicable to all collective insolvency proceedings which can result in a partial or complete sale of the debtor's assets and the appointment of a trustee.[23] The doctrine suggests that the Regulation applies to all debtors, regardless of whether they are a natural or legal person.[24] Exceptions are insolvency proceedings concerning insurance companies, credit institutions, investment firms that provide services which include access to money or securities of third parties and companies for joint ventures.[25] In the recital of the Regulation 1346/2000 it is stated that such companies are subject to special rules and that national supervisory authorities have broader powers to act.[26]

3.3. The application of Regulation 1346/2000 *ratione personae*

Although the Draft of the Regulation 1346/2000 was made with the rules of corporate bankruptcy in mind, Regulation 1346/2000 will, in principle, apply to all insolvency proceedings, whether the debtor is a natural or legal person, a trader or a private individual.[27] The question of who can be a debtor in insolvency proceedings is governed by national law.[28] It has to be stated that the legislations of EU countries vary significantly in approaches in regulating this matter, given the fact that they belong to different legal systems. In order to offer some insight into the complexity of the matter at hand, it suffices to say that Regulation 1346/2000 tried to harmonise the rules of 54 different models of bankruptcy proceedings and that there is a big difference in the scope and the application of the Regulation.[29] Depending on the perspective of the central issues posed in consumer bankruptcy, legislations are largely different. Thus, the doctrine speaks of the liberal system,

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of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions" (par. 1508. 11 U.S.C.). Using the term "shall", according to American legal theory, the court must consider foreign legal sources (a bankruptcy judge does not 'choose' to consider foreign law; the statute requires it…). See Ragan, A. C., *Comment - COMI Strikes a Discordant Note: Why U. S. Courts Are Not in Complete Harmony Despite Chapter 15 Directives*, Emory Bankruptcy Developments Journal, Vol. 27, No. 1, 2010, p. 117, 142, and 159.

23 Par. 1, par. 1, Regulation 1346/2000.

24 Garašić, J., *op. cit.* note 2 ,p. 261.

25 Art. 1, par. 2, Regulation 1346/2000.

26 Recital 9, Regulation 1346/2000.

27 Recital 9 and Art. 1, Art. 2, par. 1, p. 1, Regulation 1346/2000.

28 Art. 4, par. 2(a), Regulation 1346/2000.

29 Baltić, M., *Načela evropskog stečajnog prava sa posebnim osvrtom na evropsku regulativu o stečajnim postupcima,* Revija za evropsko pravo, Vol. 5, No. 1-3, 2003, pp. 43-63.

which lays down a small number of the necessary preconditions for access to consumer bankruptcy, which, of course, results in a large number of bankruptcies (*exempli causa*, the French model of forgiveness of debt), and conservative continental systems which are burdened with a large number of conditions implying a small number of initiated bankruptcies (*exempli causa*, the German model of consumer insolvency). While Member States have different insolvency procedures for different debtors, Regulation 1346/2000 applies to procedures set forth in Annex A of the Regulation.[30] Each Member State has informed the competent authority in the EU about the procedures included in Annex A. The States have taken different views on the application of Regulation 1346/2000 on existing insolvency procedures for consumers.

The first group of countries, Belgium and the Netherlands, have decided that the Regulation 1346/2000 should be applied to their consumer bankruptcy procedures, which are listed in Annex A. (Annex A: insolvency procedures under Art. 2, p. (A): *BELGIË - BELGIQUE* (*Het faillissement / La faillite; Het gerechtelijkakkoord / Le concordstr. judiciairei De collectieveschuldenregeling / Le règlementcollectif de dettes*); *NEDERLAND* (*Het faillissement; De surséance van betalingi De schuldsaneringsregelingnatuurlijkepersonen*).

In the second group, consisting of Germany and Austria, consumer bankruptcy procedures are not explicitly mentioned in Annex A, but since they are part of insolvency regulation mentioned in Annex A, they fall within the scope of Regulation 1346/2000.

In the third group of countries, which includes France, Finland, Luxembourg and Sweden, consumer bankruptcy procedures are not mentioned in Annex A. However, since these procedures are regulated by special laws (for example, in France, discharge of consumers' debt is regulated by the Consumer Protection Act (French *Code de la Consommation*) and are not subject to the procedures specified in Annex A, there were initially some doubts about the application of Regulation 1346/2000. Nevertheless, for instance, France has already added the safeguard proceeding to the Annex A. It could also add excessive debt proceedings for consumers ("*procédures de surendettement*") insofar as such proceedings, considered by the *Cour de cassation* as real collective proceedings, have similar effects.[31]

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30 Art. 2, par. 1, p. a.

31 Vallens, J.-L., *Reform of the European insolvency regulation on cross-border insolvency proceedings: A French point of view*, Revue des procédures collectives, May-June, 2010, p. 25 *et seq.*

4. IMPLEMENTATION OF THE CONSUMER BANKRUPTCY ACT AND ADOPTION OF REGULATION 2015/848

Bankruptcy proceedings on an individual's property as regulated in the old BA was the first step towards the possibility of conducting bankruptcy proceedings on the assets of all individuals and the introduction of consumer bankruptcy. The breakthrough was made on January 1st, 2016 when the Croatian legislator implemented the institute of consumer bankruptcy.[32] We can conclude that the legislator recognised, relatively late, the need to introduce the bankruptcy on the assets of all individuals, especially if one takes into account the fact that the consumer bankruptcy was first introduced in the European legal circle in Denmark ("*Gældssaneringslov*") in 1984[33] and that Italy is the last remaining Member State that failed to implement the institute of consumer bankruptcy.[34]

The rules related to the bankruptcy of consumers are primarily defined by the provisions of the CBA. Nomotechnically speaking, CBA is divided into two parts. The first part is divided into two sections which contain the basic provisions and regulation of non-judicial proceedings.[35] This part of the procedure consists in an attempt of a consumer to reach extrajudicial agreement on fulfilment of obligations with creditors. Only a failed attempt to reach an out-of-court agreement on the regulation of debt is a precondition for initiating court bankruptcy proceedings.[36] The second part of CBA is divided into eight sections which include basic procedural provisions in court proceedings, regulation of the authorities of bankruptcy proceedings, regulation of the initiation of proceedings and preliminary hearing, the opening of consumer bankruptcy proceedings and legal consequences of opening, bankruptcy mass and consumer protection, the conclusion of bankruptcy proceedings, the period of good conduct, the relief of the remaining debts and final provisions.[37] Thus, in the judicial bankruptcy proceedings, there is another possibility of reaching an agreement on the regulation of the debt, with the possibility of imposing solutions by the court through the so-called "rules against obstruction".[38] If, during the second stage of the proceedings, the creditors

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32 Consumer Bankruptcy Act, Official Gazette 100/15 – hereinafter: CBA.

33 See, Kilborn, J. J., *Twenty-Five Years of Consumer Bankruptcy in Continental Europe: Internalizing Negative Externalities and Humanizing Justice in Denmark*, International Insolvency Review, vol. 18, no. 1, 2009, p. 155.

34 See, The Bill, *Disegno di legge.* URL=http://www.senato.it/leg/16/BGT/Schede /Ddliter/testi/29935 _testi.htm. Accessed 14 December 2016.

35 Art. 1-20, CBA.

36 Art. 8-20, CBA.

37 Art. 21-81, CBA.

38 Art. 44-53, CBA.

do not accept the debt management plan of the debtor, a bankruptcy procedure is opened and a liquidation of the debtor's unexempt property follows. This happens in legal proceedings with simplified rules. Depending on the motion of the debtor, the release of the remaining debts can follow. This happens over a period not exceeding five years (the so-called period of good behaviour). Since CBA does not regulate consumer bankruptcy with an international element, *mutatis mutandis* are applied[39] provisions of the BA on international bankruptcy,[40] while for the EU, provisions of Regulation 1346/2000 are in force. From 26 June 2017 we will have a new primary source of the bankruptcy law, the Regulation (EU) 2015/848 of the European Parliament and of the Council of May 20th,2015 on insolvency proceedings. The Regulation was published on 5th of June 2015 in the OJ of EU, entered into force 20 days after the publication and shall be applied as of 26th of June 2017.[41] The text of the EIR Recast is twice as large. It contains 89 recitals, 92 articles and four annexes (A: listing all the national names of insolvency proceedings; B: all national names of insolvency practitioners; C: listing all repealed Regulations, including Regulation 1346/2000, and D: a correlation table of the Articles of the EIR and those of the EIR Recast). The very concept of Regulation 1346/2000 is not modified in the context of the reform; a new version consists of partially known, partially revised, but also a whole series of new provisions. The new provisions of Regulation 2015/848 are primarily provisions on insolvency proceedings of a group of companies[42] and certain provisions on data protection.[43] *Summa summarum,* similar to the solution of Regulation 1346/2000, Regulation 2015/848 solves the problem of conflicts of jurisdiction by enabling main insolvency proceedings to be opened before the Court where the debtor has the centre of its main interests, and at the same time permitting that the special insolvency proceeding is commenced in another Member State where the debtor has an establishment. The effect of the special insolvency proceedings are limited to the assets located in that State.[44] Rules on international jurisdiction, based on a debtor's COMI, are further specified, including the possibility of a judicial review,[45] whilst jurisdiction for insolvency-related actions (actions which derive directly from the insolvency proceedings and are closely linked to them) is now included in the text.[46] The material scope of the recast EIR is broader than the scope of the origi-

39 Art. 23, CBA.

40 Art. 392-427, BA

41 Hereinafter: Regulation 2015/848.

42 Art. 56-77, Regulation 2015/848.

43 Art. 78-83, Regulation 2015/848.

44 Art. 3, par. 1, Regulation 2015/848.

45 Art. 4 and 5, Regulation 2015/848.

46 Art. 6, Regulation 2015/848.

nal EIR, as it extends to proceedings, among others, granting debt-relief or debt adjustment for consumers or the self-employed. In other words, when Regulation 2015/848 deals with the concept of a natural person, an individual who performs independent business or professional activity, it is presumed that the centre of their main interests is situated in the principal place of business of the individual if it is not proven otherwise. This presumption applies only if the principal place of business of the individual is not moved to another Member State within a period of three months before the proposal to initiate insolvency.[47] In the case of any other individual, it is presumed, unless proven otherwise, that the centre of their main interest is the usual place of residence of the individual. This presumption applies only if habitual residence has not been moved to another Member State within a period of six months before the proposal of initiation of insolvency.[48] Nevertheless, taking into account the lack of harmonisation in the domestic consumer bankruptcy legal regimes, there is still a proper „breeding ground" for insolvency forum shopping. The legal consequences of the main proceedings must be recognised in all Member States; a bankruptcy manager who is appointed in the main bankruptcy proceedings must be recognised and able to exercise his powers and rights in all Member States without the need for additional injunctions.[49] If and when the question arises of the bankruptcy proceedings in the territory of another Member State where the debtor has an establishment rather than the main centre of interest, this is the question of the so-called special bankruptcy proceedings.

5. CONCLUDING REMARKS

There are many questions concerning the application of consumer bankruptcy law with an international element. One of the major problems of the existing Regulation is that all of its primary objectives are aimed at protecting the rights of creditors.[50] On the other hand, consumer bankruptcy has a specific material and legal objective, which refers only to the economic rehabilitation of debtors and represents *differentia specifica* in relation to corporate bankruptcy.[51] There is an additional problem that arises from the fact that the holders of the freedom of establishment are also natural persons who are nationals of Member States. Moreover, Member States cannot condition or change the application of this rule by a bilateral agreement with another Member State as the content of the freedom of

47 Art. 3, par. 1, p. 3, Regulation 2015/848.

48 Art. 3, par. 1, p. 4, Regulation 2015/848.

49 Art. 19, Regulation 2015/848.

50 Virgos, M., Garcimartin, F., *op. cit*. note 2, pp. 7–8.

51 Art. 2, CBA.

establishment is defined by the Treaty establishing the European Community.[52] Therefore, consumers often, before initiating the process of debt relief, change their habitual residence which can be considered abuse. For example, due to liberal approach to the process of release of the remaining debts, France became "popular" for consumers (i.e. *forum shopping*). The goal is to get faster and cheaper debt relief, which is not in the interest of creditors since it does not contribute to the preservation of the bankruptcy estate and the return of overdue debts to the creditors. On the other hand, in Germany, the debt relief is obtained after a period of good behaviour, which lasts for six years. During that period, the debtor is required to give creditors certain amounts from the debtor's unexempt property. Therefore, the system of debt relief in France, especially in the department of Haut-Rhin, Bas-Rhin and Moselle, is much more debtor-friendly. However, we should be aware that the consumers can change their residence before submitting a proposal for consumer bankruptcy for reasons unrelated to the impending insolvency. Therefore, the assessment as to whether the change of residence is abuse should be made after a consideration of the facts of each individual case. In any case, the decision of the European Court in the case *Staubitz-Schreiber*[53] is very significant. In this case a question was raised before the European Court – does the court of the Member State which receives a request for the opening of insolvency proceedings still have jurisdiction to open Insolvency proceedings if the debtor moves the centre of his or her main interests to the territory of another Member State after filing the request, but before the proceedings are opened, or does the court of that other Member State acquire jurisdiction? Specifically, it was decided according to Art. 3, par. 1 of the Regulation 1346/2000, that the Insolvency proceedings stipulates that the court of the Member State within the territory of which the centre of the debtor's main interests is situated at the time when the debtor lodges the request to open insolvency proceedings retains jurisdiction to open these proceedings if the debtor moves the centre of his main interests to the territory of another Member State after lodging the request, but before the proceedings are opened. Thus, at some point, an individual can only have one country as the centre of its main interests. The relevant date is the date of initiating insolvency proceedings. Therefore, the Court retains jurisdiction even if the debtor's main interests are subsequently changed in the sense that they move on to another country. The novelty of Regulation 2015/848 with regard to jurisdiction concerning an individual is that it now distinguishes between professionals and individuals/consumers with different „suspect periods".

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52 Art. 43 and 48, Treaty Establishing the European Community, Consolidated Version, [2006] OJ C 321.

53 Case C-1/04 Susanne Staubitz-Schreiber [2006] ECR I-701.

Furthermore, a problem can arise if the Member State has not implemented the institute of consumer bankruptcy, as in the case of Italy. The doctrine states that, if it is assumed that the centre of main interests of the debtor is in a state that recognises the consumer's ability to declare bankruptcy, then the main insolvency proceedings will be opened in that State and it will be recognised in any other EU Member State, regardless of whether that Member State allows bankruptcy proceedings against these persons. The state of recognition may not invoke the protection of public order as a legal basis for refusal of recognition.[54] In the opposite situation, where the state which has an international jurisdiction to open insolvency proceedings does not recognise the bankruptcy ability of a particular person, the main bankruptcy proceedings cannot be opened. However, this does not mean that in this case an independent territorial insolvency (special - particular) proceeding cannot be opened, because there is an inability to open the main insolvency proceedings.[55]

Furthermore, in the insolvency proceedings with an international element, one of the fundamental problems is the formation of the insolvency mass since the property is located in a few countries. However, we should take into account the fact that consumers can keep unexempt assets. *Lex fori concursus* decides which assets of the debtor are, and which property is not included in the bankruptcy estate. At the practical and empirical level, the situation becomes very complex; specifically, in case of a home and privilege of a consumer to invoke the right to a home. For example, CBA follows the judicial doctrine of the Convention for the Protection of Human Rights and Fundamental Freedoms in relation to Article 8, which resulted in thousands and thousands of cases. These cases have been stopped for a whole decade at the stage of enforcing the claims of creditors on debtors' home, because it is very questionable from a social point of view. Furthermore, in practice, the consumers are obliged to co-operate with insolvency administrators. A practical problem may arise from the question of how the bankruptcy manager can find out about the existence of a property in another state, and, in the Croatian case, whether he has an incentive to do so? Although the CBA came into force, the issue of regulating the system of compensation, providing adequate incentives for the operating body of consumer bankruptcy proceedings, namely, the bankruptcy manager, has not yet been satisfactory solved.[56]

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54 Art. 19, par. 2, Regulation 2015/848.

55 Virgós, M., *The 1995 European Community Convention on Insolvency Proceedings: An Insider's View,* Forum Internationale, No. 25, 1998, fn. 17.

56 Bodul, D., *Novo operativno tijelo u sustavu kolektivne zaštite potrošača - povjerenik*, *Hrvatska pravna revija*, No. 1, 2017, pp. 52-60.

Thus, a common problem in international consumer insolvency proceedings is the fact that debtors often work in a country other than their country of residence. Respecting the right to freedom of movement for workers, debtors can migrate to another country during the insolvency proceedings. In such situations, the problem of the termination of the enforcement proceedings in another Member State occurs, as well as the problem of an efficient fulfilment of the debt repayment plan. An additional problem is that the debt repayment plan can last for years, and debtors will have to move during this period. By moving to another Member State, it is likely that debtors' economic circumstances will change, as well as their ability to meet their debt repayment plans. What legal consequences the relocation has on the plan of debt repayment and whether debt repayment plan can be modified, depends on the applied law, and whether there is an economic interest of a creditor to enforce their claims in the event of non-co-operation of the debtor.

Although all these situations impose caution, a new regulation has some advantages in terms of consumer-debtor relations. In particular, it offers comprehensive solutions in terms of the effects of actions in other Member States. On the one hand, it is understandable to expand its application to insolvent consumers. On the other hand, it is doubtful whether this is the most acceptable solution for the consumers. Thus, regardless of the enthusiasm that is evident in the area of legal literature, harmonisation of law in practice has proven to be a hard and slow process at the European level. Even if the EU has created and established a common market of hundreds of millions of people from different Member States, there are many differences within the EU. Therefore, the task of creating a real joint cross-border (consumer) insolvency law is a difficult one, especially in the light of the recital in which it was pointed out that cross-border insolvency proceedings should be "effective" and "urgent".

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