



Ascertainment and application of foreign law in international insolvency proceedings

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- What are the legal effects of the regulation in Art. 7 of the Insolvency Regulation Recast?
- Do all exemptions to *lex fori concursus* (Art. 8 – 18) have the same legal effects?
- Who is to ascertain the foreign law and how?

What are the legal effects of the regulation in Art. 7 of the Insolvency Regulation Recast?

- *Lex fori concursus* - law of Member State where insolvency proceedings opened
- Insolvency law in general – regulation of procedural and substantive questions related to insolvency proceedings
- Questions demonstratively set out in Art. 7 (2) – procedural and substantive

What are the legal effects of the regulation in Art. 7 of the Insolvency Regulation Recast?

- Law applicable to insolvency proceedings – court of *lex fori concursus* will conduct insolvency proceedings pursuant to its domestic procedural rules
- *Lex fori concursus* determines the effects of insolvency proceedings, both substantive and procedural (also Recital Nr. 66)
- Art. 7 – a norm of private international law – procedural and substantive law questions
- Territorial application of the Regulation – Art. 7 may refer only to law of a Member State
- Application only to questions closely linked to the insolvency proceedings

Do all exemptions to lex fori concursus (Art. 8 – 18) have the same legal effects?

- Art. 8 - third parties' rights *in rem* to assets belonging to a debtor situated within the territory of another Member State at the time of the opening of proceedings
- The creation, validity and scope of rights *in rem* - governed by law of that Member State
- Insolvency practitioners may claim, pursuant to *lex fori concursus*, such asset as part of the debtor's estate
- Insolvency practitioners have to accept the creation, scope and execution of such rights *in rem* pursuant to foreign law (if there are no reasons for voidness, voidability or unenforceability)

Do all exemptions to lex fori concursus (Art. 8 – 18) have the same legal effects?

- Art. 9 – the opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of a debtor, where such set-off is permitted by the law applicable to the insolvent debtor's claim
- The applicable law may be a law other than *lex fori concursus* – a creditor may set off his claim pursuant to such law
- Insolvency practitioners have to decide whether to accept or challenge the set-off – their decision has impact on further course of the insolvency proceedings

Do all exemptions to lex fori concursus (Art. 8 – 18) have the same legal effects?

- Art.11 - the effects of insolvency proceedings on a contract, conferring the right to acquire or make use of immovable property shall be governed solely by the law of the Member State within the territory of which the immovable property is situated
- The reference to a foreign law includes insolvency law of such foreign law
- Insolvency practitioners should have knowledge of foreign law
- They have to decide which steps shall be taken – not only examine whether legal steps were previously taken pursuant to the foreign law

Do all exemptions to lex fori concursus (Art. 8 – 18) have the same legal effects?

- Art. 13 - effects of insolvency proceedings on employment contracts shall be governed solely by the law of the Member State applicable to the contract of employment
- Applicable law will be determined pursuant to Rome I regulation
- Insolvency practitioners shall determine such law and decide on the effects (i.e. termination, remuneration) – decide about further steps pursuant to the foreign law

Do all exemptions to lex fori concursus (Art. 8 – 18) have the same legal effects?

- Legal effects of particular exemptions are not the same
- Insolvency practitioners accept a legal act concluded pursuant to the foreign law – right *in rem*
- Insolvency practitioners examine whether the legal act is valid pursuant to the foreign law – set-off
- Insolvency practitioners decide on legal effects pursuant to the foreign law – immovable property or employment contracts

Who is to ascertain the foreign law and how?

- In cases of application of foreign law pursuant to the Insolvency Regulation Recast by the court – the foreign law will be ascertained pursuant to the domestic law – Regulation has no provisions on how to ascertain foreign law
- Czech Private International Law Act – Section 23 – Court may ask for information on foreign law – Ministry of Justice
- Example: An insolvency practitioner does not agree with set-off pursuant to a foreign law or an insolvency practitioner terminates an employment contract pursuant to a foreign law
- In these cases the insolvency court corrects “incorrect” application of a foreign law in insolvency proceedings

Who is to ascertain the foreign law and how?

- Czech PILA – no provisions on the ascertaining of foreign law for insolvency practitioners – in practice – legal opinions from law firms
- Incorrect application of foreign law – lengths of insolvency proceedings, increased costs for parties involved
- Conclusion: insolvency practitioners – “the first instance” in dealing with foreign law in practice – shall have a tool for ascertaining the foreign law (provided by domestic law or EU law) – cost savings, foreseeability, shortening of proceedings