Cross Border Insolvency, Intellectual Property Litigation, Arbitration and »Ordre Public«

Edited by
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Problems of Transnational Civil Procedure

Volume
V

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ISBN 978-3-16-151023-6 / eISBN 978-3-16-160730-1

Die Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliographie; detailed bibliographic data are available on the Internet at *http://dnb.d-nb.de*.

The book was typeset, printed on non-aging paper and bound by Gulde-Druck in Tübingen.

Printed in Germany.

Preface

This fifth and final volume of the book series "Problems of Transnational Civil Procedure" comprises contributions from two symposia held in Nagoya, Japan. The first symposium, entitled "Cross-border Insolvency", took place on March 7-8, 2009; the second, entitled "Recent Issues of International Business Litigation and Arbitration", on November 14-15, 2009. Both symposia were part of an international research program in the field of transnational civil procedure sponsored by the Japanese Society for the Promotion of Science from 2005 to 2010. A series of conferences twice a year in different locations in Japan as well as in Europe laid the basis for a stimulating debate about a variety of current problems of international litigation. The results are published in a number of international and national book projects. All results can be found on the homepage of the international working group at http://www.law.nagoya-u.ac.jp/ccli/en/.

The fact that market participants may go bankrupt is a phenomenon common to all market economies. National markets have for a long time known rules for dealing with such events. The globalization of markets as well as the emergence of global players in these markets confronted the traditional approach of national insolvency laws with a number of recurrent problems. Are national regulations able to deal with the challenges of e.g. insolvencies of multi-national business entities or will only transnational regulations of cross-border insolvency help out? The first part of the volume is intended to shed light on questions of international jurisdiction in insolvency matters, national solutions of cross-border insolvency, security interests in insolvency proceedings and the recognition and assistance of foreign insolvency proceedings.

The recent issues, to which the second part of this volume is mainly devoted, are comparative studies on intellectual property litigation and the significance of ordre public for recognition and enforcement. Technical development fans the flames of the economy. To protect the investments in research and development, a protection of their results is therefore very important. On the other hand, a globalized world facilitates infringements of intellectual property rights. Thus, in a globalized world, some sort of globalized protection for intellectual property rights is desperately needed. This requires, last but not least, effective intellectual property litigation on an international scale. Chapter two of the second part of this volume deals with the problems concerning such litigation.

Chapter three of the second part concentrates on the significance of "ordre public" for recognition and enforcement. On the one hand, recognition and enforcement of foreign decisions is indispensable in an internationally interwoven economy. On the other hand, sometimes foreign judgments or arbitral awards interfere with fundamental principles of the national legal system. "Ordre public" has since long been a final filter for such cases. However, if one starts from the premise that a discrimination of foreign legal systems and courts is unwarranted, "ordre public" appears to be unnecessary. The contributions deal with this and related questions from a national and international point of view.

As always, the Institute for Business Litigation of Nagoya University at Freiburg University, Germany, prepared the edition of this volume. The Institute was established to promote and run the research project in collaboration with the Institute for Civil Procedure and Comparative Civil Procedure at the Freiburg University. We would like to thank Dr. Natalie Konomi, who organized to a remarkable part the editing work for this volume together with Ms. Tohko Hayakawa, for the assistance, and the Japanese Society for the Promotion of Science as well as the Law Faculty at Nagoya University for their generous financial support. Dr. Jan Malte von Bargen, LL.M. (University of Michigan) and Victoria Marini, Institute for German and Comparative Civil Procedure at the University of Freiburg, contributed intensively to the final editorial work.

As this project has come to an end, we again would like to thank all the participating members of our network who during the last years spent an enormous amount of time and efforts to contribute to the success of this project. We would also like to express our deepest gratitude to the Japanese Society for the Promotion of Science.

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Freiburg / Fukuoka, July 2011

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Masanori Kawano

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I. Introduction

For the last two decades globally expanding and integrating business activities have grown rapidly. The numbers increased to a degree that these sorts of activities reach almost in all fields of our daily life. Today it is not possible to realize and enjoy our convenient and affluent daily life without getting in contact with the results of those global and extensively integrated business activities. It is normal and common that business entities disperse their factories, business branches and/or subsidiary companies in foreign countries. Furthermore they produce commodities, supply their services, invest capital and try to find well-qualified human resources at appropriate places all over the world. Possibilities of easy, fluid and swift business activities have become a central consideration for international business entities. Because of such globally expanding and fluid activities many leading business entities have been developed multi-nationally. Today they have indispensably a more or less transnational character. Because of their strong influences on the regional and international economy, their destiny has strong impacts on the world economy. They can function successfully and positively, but sometimes they can also fail. By dispersion of their branches big corporations can reduce their risks, but on the other hand they can seriously suffer due to foreign affairs, foreign economic misfortune, some failure or difficulties of their foreign customers or partners.[1]

[1] Recent *Subprime Housing Loan* problems and the *Lehman Brothers Holding Company*

To regulate the failure of business entities some legal facilities like bankruptcy or insolvency exist. They are prevailed as a mechanism by which the legal relationships of the default debtor should be liquidated by a court decision and by the arrangement of an administrator. Such legal mechanisms have been regarded as authoritative activities of the national court and therefore their effects are restricted within the territory of the country or jurisdiction in which the court of the bankruptcy case is located. Traditionally the so-called territorial principle has prevailed in most bankruptcy and insolvency laws. For a long time regulations on cross border bankruptcy or insolvency were not commonly known.

Because of the territorial nature and the lack of effective cross border insolvency regulations, there were serious difficulties to handle the insolvency of globally expanded multi-national business entities. Especially since the 80's of the last century a number of big cross border insolvency cases occurred resulting in discussions about the need of transnational regulations of cross-border bankruptcy or insolvency. Today some developments of transnational cooperation for a harmonized regulation of cross border insolvency can be found.

Here I would like to survey some fundamental features of the recent development of cross-border insolvency law as an introduction to the following discussions.

II. Development of Cross-Border Insolvency Law

1. Regulations of insolvency or bankruptcy law have maintained their own characteristics of civil justice because of their historical background and their long practices. In general terms it can be said that insolvency law always relates to many features of legal problems and by its nature to complex judicial procedures with procedural and substantial aspects.[2] But it also has been found to be a court procedure for the liquidation of the debtor's legal relationships with coercive orders, an enforcement on the debtor's collaterals and also an order to creditors to prohibit them from the individual collection of their credits. It therefore has been traditionally seen as an act of sovereignty.[3] As business activities have for a long time been developed exclusively within the borders of a country and their activities over the borderlines were exceptional, it was sufficient that the insolvency law provided only for domestic cases. This territorial principle of bankruptcy law was the general and prevailing basis of national legislation for insolvency laws in most countries for a long time.

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case in the USA illustrate a good example of profound and wide influences of business failure with worldwide effects.

[2] See *Savigny*, System des heutigen Römischen Rechts, Bd. 8., p. 286 ff.

[3] *Kohler*, Lehrbuch des Konkursrechts,1891, p. 603.

One of the typical insolvency systems based on an extreme version of the territorial principle were the old Japanese Insolvency Laws.[4] In Japan the first western-styled bankruptcy law was accepted in the first Commercial Code of 1880 based on the French Code of Commerce. No regulations on cross-border insolvency were included in this code. The law was completely changed in 1922 by the new legislation of the independent Code of Bankruptcy, *Hasan-hou*, now established based on the German Bankruptcy Code of 1877, *Konkursordnung*. Based on the strict territorial principle this Code included a negative regulation regarding cross-border bankruptcy in providing, to restrict the effect of the commencement of bankruptcy only on property of the debtor within Japanese territory (Art. 3 Sub. 1 old Bankruptcy Law) as well as to deny the effects of foreign bankruptcy procedures on property within Japanese territory (Sub 2). This position was known as the so-called extreme territorial principle. The same position was also adopted in the Adjustment Law, *Wagi-hou*, which was promulgated in the same year based on the Austrian model of Adjustment, *Ausgleichsordnung* of 1918. Even after the Second World War, in 1952, the Law of Corporate Reorganization, *Kaisha-kouseihou*, promulgated under the instruction of the General Headquarter in Japan led by United States, allowing to reorganize insolvent shareholders' corporations based on the *Chandler Act* of 1938[5] of the USA, was built on this principle. Regarding the international aspects of this new law there was no difference of the position compared to that of the previous laws: The provisions based on the territorial principle as well. In these days Japanese business did not have the power to develop transnational expansions, and it was even not extended over all the Japanese territory. Therefore, there had been no need to establish regulations for cross-border insolvencies.

The position of the Japanese insolvency law based on the territorial principle was not exceptional. Most insolvency laws of other countries knew regulations based on the territorial principle. But this slowly changed. Meanwhile the increasing number of transnational business relations created an atmosphere asking for a change of this policy towards a system taking into account the needs of cross-border insolvency regulations and the necessity to harmonize the national laws of insolvency.

2. The traditional situation regarding cross-border insolvencies was more or less not different in most countries until the 70's of the last century. But since the

[4] In Japan the insolvency law was not codified in a single uniform act, but it has been developed historically in different forms of procedure. Applicants had to choose the appropriate procedure.

[5] The Chandler Act reviewed many of the provisions of the 1898 Act. The most significant innovation was to provide reorganization provisions; *Tabb*, The Law of Bankruptcy, 1997, p. 36.

mid 70's of the last century there were cases, which included some aspects of cross-border insolvency.

One of the big and remarkable cases of an early cross-border insolvency was the German *Herstatt-Bank* Case[6] in 1974, an adjustment case that a German private bank filed with a court in Cologne. In this case it was thought to attach bank accounts in New York outside the adjustment procedure so that the creditor could be more profitable than in a pure "German" adjustment procedure. The case fostered discussions concerning cross-border insolvency law. Again at the end of the 80's a larger cross-border insolvency case, the *Maxwell Communication Corp.* case occurred. Procedures were competitively filed in the USA and in England.

In Japan the *Kosei-Maru* case was a remarkable case. A creditor disputed the effects of a Japanese court order for the commencement of corporate reorganization procedures as well as the effects of a Japanese court order to suspend a procedure to foreclose a mortgage against a ship anchoring in Canada. A Canadian court ordered that the effects of the Japanese procedure of Corporate Reorganization would not extend over Japanese borders because of the Japanese territorial principle. At that time Japan was very famous for its extreme territorial principle.

3. In the 1990's significant discussions and developments for the transnational cooperation and harmonization of insolvency laws were discussed. One of the most progressive developments was the preparation of a Model Law on Cross-border insolvency by UNCITRAL (United Nations Commission on International Trade Law), another major issue were the discussions and regulations in EU countries. Because of the different focus divergences between both regulations can be found: UNCITRAL proposed a model law and focused on the harmonization of national legal systems by establishing an alignment of national laws regarding the insolvency law of international communities. The European attempts had the purpose to establish common regulations within a common market in the European Union.

But even with these differences taken into account, also common features between them exist. A very important point of similarity is the method of regulation. Both bodies did not intend to establish totally uniform regulations of insolvency law, but sought to provide harmonization only for special parts of the field of law by amendments that would follow the Model Law or by direct regulations of cross-border insolvency.

The agreement to publish a Model Law was a modest way for harmonizing legal systems that all have different legal traditions and long practices. Needs for transnational harmonized regulations of cross-border insolvency law were dis-

[6] *Dubischar*, Prozesse, die Geschichte machten, 1997, p. 49 ff.

cussed and proposed by the organization of transnational bankruptcy lawyers[7]. UNCITRAL succeeded the discussion and adopted the Model Law on Cross-Border Insolvency in 1997.[8]

The purpose of the Model Law is to encourage international cooperation with respect to transnational insolvency cases. The method is to stimulate an alignment of national legislation by adopting the Model Law. In its preamble the Model Law provides a more detailed description of the purposes of the Law.

The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency as well as to promote the objectives of:

(a) cooperation between the courts and other competent authorities of the State and foreign States involved in cases of cross-border insolvency;
(b) greater legal certainty for trade and investment;
(c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including debtors;
(d) protection and maximization of the value of the debtors assets; and
(e) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

The Model Law provides mainly regulations for the access of foreign representatives and creditors to national courts (Chapter II), the recognition of foreign proceedings and reliefs (Chapter III) and for the cooperation with foreign courts and foreign representatives (Chapter IV). Regulations concerning the jurisdiction of main insolvency proceedings were entrusted to each national insolvency law. The Model Law accepted the so-called restricted universal principle of insolvency law.

4. In the European Union also the necessity was felt to realize harmonized cross-border insolvency laws. As one of the central purposes of the establishment of the EU was and still is to establish a free market without national restrictions, the negative impacts of the possibility of *forum shopping* for a profitable procedure within the national member states are not hard to be anticipated. Legal regulations of cross-border insolvency, should on one hand respect the national legal system of each member country, but on the other hand, foreclose the possibilities of *forum shopping* within the member countries as well.

The Commission of the European Union provided the Regulation on Insolvency Procedure, No. 1346/2000, based on Art. 61 (c) and 67 (1) of the EC-Treaty. This EU regulation applies directly in all the member states, except

[7] International Association of Insolvency Practitioners (INSOL) and International Bar Association (IBA).

[8] The Model Law was adopted by the General Assembly of the United Nations in 1997.

Denmark. The European Court is designated to control the application and interpretation of the law. Various assets as those of insurance companies, credit institutions, institutions for commercial papers or labors are exempted from the scope of the regulation.

Because of its central and significant role to prevent from *forum shopping*, international jurisdiction of cross-border insolvency procedure should be adequately regulated. The regulation adopted the English concept of the debtor's "Centre of Main Interests" (COMI). This concept regulates that the jurisdiction of the main insolvency procedures of a case should be determined by the location of the COMI in a member state of the European Union. A procedure started in the jurisdiction of a member state by the consideration of COMI should be automatically recognized in other member states.

Being the central element for deciding on the international jurisdiction of cross-border insolvency procedures, the theory of "Centre of Main Interests" has been discussed from different aspects[9] and was also in the focus of judgments by the European Court. Especially in the case of *Eurofood/Parmalat* the Court stressed on the place where the debtor normally administrates or manages his business, being clearly identified by the third person.

III. UNCITRAL Model Law and National Legislations

1. Generally speaking, the UNCITRAL Model Law plays a big role for realizing a transnational harmonization of cross-border insolvency laws. To fulfill this purpose it is required and hoped by UNCITRAL that every national legislator will transfer the Model Law into its national Law or at least amend each national insolvency law in accordance to the regulations of the Model Law.

2. As already mentioned above, Japanese insolvency laws have been based on the extreme territorial principle and were therefore notorious in the international community of practical lawyers. But since 1996 the Japanese insolvency laws have been the subject of amendments and in 1999 the Law of Civil Rehabilitation, *Miji-Saisei-hou*, was promulgated.[10] Chapter 10, now Chapter 11, of the law provides special provisions for the cases of foreign insolvency proceedings. Following the path of the totally changed legislation of the Law of Civil Rehabilitation, the Law of Corporate Reorganization, *Kaisha- Kousei-hou*, was

[9] From a German perspective, *Huber*, Probleme der Internationalen Zuständigkeit und des forum shopping aus deutscher Sicht, in: *Gottwald* (Hrsg.), Europäisches Insolvenzrecht, 2007, p. 1; from an Italian perspective, *de Cristofaro*, Probleme der Internationalen Zuständigkeit und des forum shopping aus ausländischer Sicht, in: *Gottwald* op. cit., p. 39.

[10] Generally, *Kawano*, Das neue Sanierungsverfahren in Japan, ZZPInt. Bd. 5 (2000), p. 415.

completely changed and promulgated in 2002. Then in 2004 the Law of Bankruptcy, *Hasan-hou*, was also changed and promulgated. The Laws from 2002 as well as 2004 provide the same provisions relating to cross-border insolvency cases as the ones regarding cross-border insolvencies in the Law of Civil Rehabilitation.

All these provisions comprehend rules relating to the foreign insolvency proceedings as follows:

(1) The debtor (in possession) or administrator has the power to address the foreign administrator for cooperation requiring necessary assistance and receiving information,
(2) the power or authority of foreign administrators to file with a Japanese court to commence Japanese insolvency procedures, and
(3) the possibility of cross filing by the foreign administrator. The foreign administrator has the power to file with a Japanese court for representing foreign creditors who applied foreign procedure. Debtor and administrator have the power to file with a foreign court to represent creditors who applied their credits.

As to the recognition and support of foreign insolvency procedures the Law of Recognition and Support for foreign Insolvency Procedure was promulgated in 2000. The law adopted the UNCITRAL Model Law. But there is no direct provision relating to the international jurisdiction of insolvency procedures in the recognition law, nor in each insolvency law. The international jurisdiction of Japanese courts for cross-border insolvency cases shall be decided by the provisions about the domestic venue of a debtor; Art. 4 and 5 of the Law of Bankruptcy; Art. 4 and 5 of the Law of Civil Rehabilitation and Art. 4 and 5 of the Law of Corporate Reorganization.[11]

According to the Law of Civil Rehabilitation and the Law of Bankruptcy, the debtor as a business entity, has jurisdiction in Japan if he has a business office, office or assets in Japan. In the case of a corporate reorganization, the debtor corporation can only have jurisdiction in Japan if he has an office in Japan.

The U.S.A., as the biggest economic and business country in the world, accepted the UNCITRAL Model Law, amended their Bankruptcy Code and added Chapter 15 in their Code in 2003, too.

[11] See *Haga*, Das europäische Insolvenzrecht aus der Sicht von Drittstaaten, in: *Gottwald*, op cit, p. 169, 188.

IV. Forms of Cross Borderline Business Entities and Insolvency Procedure

1. Globally expanding business entities have different forms of organizing cross-border business.

One typical form of globally expanding entities organized as a corporation with many subsidiary departments or assets like factories or business branches in different countries. In this case all assets and properties belong to the one corporation. Sometimes, however, they can have the form of a *concern* (German name for a general type of business organisation), a group of business entities, in which there is a main company with many subsidiaries. In these cases the subsidiary companies could be defined as independent entities. The recent cross-border insolvency laws do not yet regulate these forms of binding business entities.

2. In the case of insolvency of such a big corporation formed with many subdivisions in different countries, the main insolvency procedure should be filed with the court in the jurisdiction where the main office is located. There have to be, however, possibilities of "second procedures" or some procedural measures to secure and to protect the debtor's assets in foreign countries as well. The realization of adequate and fair procedure as well as the protection of creditors' rights in the field of international corporations is the main field of recent cross-border legislation.

3. *Concern* insolvency cases foster the demand for more complex legal regulations and are therefore discussed very controversial. Questions focus on solutions dealing with the insolvency of member business entities with different Centres of Main Interests. No regulation of a unified procedure is provided for these cases by the UNCITRAL Model Law as well as by the European Regulations on Insolvency Cases. But the international practice of cross-border insolvencies developed tools and practical ways to deal with those cross-border insolvency cases.

One of the more extreme models is the principle of "one judicial entity or person, one insolvency and one procedure". Insolvency cases of a big *concern*, inevitably involve many companies as well as many administrators in the procedure. Those cases are often very difficult to manage. The other possibility that only one administrator should administer the whole insolvency cases is difficult to imagine, too.

In many cases there will be more than one administrator in each procedure and they should have the legal tools to cooperate with each other. Practical experiences lead to instruments establishing accepted habits e.g. agreement or