Ekonomia i prawo upadłości przedsiębiorstw

ZARZĄDZANIE PRZEDSIĘBIORSTWEM W KRYZYSIE

redakcja naukowa
Sylwia Morawska

OFICYNA WYDAWNICZA
SZKOŁA GŁÓWNA HANDLOWA W WARSZAWIE
WARSZAWA 2012

Irina Getman-Pavlova

5.2. Conflict Regulation of Across-the-Border Insolvency

The institute of across-the -border insolvency is the independent branch in the system of PIL. There are some fundamental difficulties with seeking to resolve such traditional matters of PIL/ICP as – the questions of competent jurisdiction and the choice of law. I'm going to set your choice on the questions of the choice of law. Modern national legal regulation of these problems may be classified into four groups:

1. Bankruptcy law includes separate special norms, which regulate particular questions of across-the-border insolvency (Russia, Italy, Liechtenstein, Moldova, Georgia). The most modern legislators all over the world prefer this way.
2. Some units are included in bankruptcy which are focused on solving complex of the most difficult questions of across-the-border insolvency (USA, Germany, Spain).
3. The adoption of particular laws regulated the most important questions of across-the-border insolvency (Japan), or separate laws which are entirely devoted to the management of this institute (Romania, United Kingdom). Now, it's perhaps the optimum alternative of regulation.
4. The last point is inclusion some units of regulation of across-the-border insolvency in general codification's acts of PIL (Switzerland, Belgium). This is the best standard of regulation.

The first model was implemented in Georgia – art. 34 in the Law "About insolvency proceedings" 1994 r. The foreign proceeding or the foreign court's decision must be recognized, if a real estate and creditors are on the territory of Georgia. Grounds for rejection of recognition are the violation of the international jurisdiction's rules and conflict by consequences of such recognition to Georgian public order. The international jurisdiction's rules are defined on the base of Georgian legislation. Foreign proceeding must be recognized without the international agreement. Foreign proceeding's recognition does not preclude to start in Georgia a parallel (particular) proceeding against a Branch or a Department of foreign debtors. Only those creditors are able to take place in such proceeding, whose claims are arisen from the branch's activity. Particular proceeding protects the interests of Georgian creditors first of all.

The second model is fixed in Spanish legislation. The Law of competitive proceeding 2003 r. contains the IXth unit "The rules of PIL". This unit is the synthesis of provisions of European Union Regulation of Insolvency Proceedings (which became effective May 29, 2002) and UNCITRAL Model Law of Across-the -Border Insolven-

cy. The approach of the Spanish legislator based on the principle of universality. The recognition of foreign proceeding as basic does not preclude to start a proceeding against Spanish debtor's holdings resources. Absence of reciprocity is one of the reasons for the refusal to recognize foreign judicial act, which was adopted with regard to case of bankruptcy. Lex fori concursus is applied to proceeding, which was sued in Spain. Exceptions to this principle are completely concurred with the requirements of European Union Regulation.

The third model is created in Japan. There is the Law about the recognition of the foreign proceeding of insolvency and cooperation 2000 r. This Act implements the principle of „truncated universality". Foreign proceedings are recognized but only in certain cases (the list is exhaustive). The Act provides for the abolition of such recognition and defines grounds of mandatory cancellation and cancellation at the discretion of the court. Japanese court does not recognize the foreign proceeding in the next cases:

- foreign proceeding may not be covered the Japanese property of debtor,
- consequences of such recognition contrary to public order or foundations of morality in Japan,
- fraud had taken place when application for recognition was given.

The same model is allocated in the legislation of Romania. There is the Law of private international law in the area of bankruptcy 2002 r. The Act is an extremely high standard of regulation and logical continuation of the codification of the Romanian PIL (The law in relation to the regulation of relations of private international law 1992 r.). The general approach is based on the principle of universality. „Lex fori concursus" is the main conflict rule. Exceptions from „lex fori concursus" coincide with the provisions of European Union Regulation of Insolvency Proceedings.

The fourth model was developed in Switzerland. There is the Act of Private International Law 1987 r. (art. 166–175 in title 11 «Bankruptcy and settlement agreement in the bankruptcy proceeding»). Foreign insolvency decision made in the State of debtor's residence, is recognized at the request of foreign administrator or one of the creditors. Terms of acceptance are:

- the decision came into force in the country where the rendition was,
- there are no grounds for refusal of recognition provided by Swiss law,
- state in which the decision is made ensures reciprocity.

Statement on recognition of foreign decisions is served in a Swiss court in the location of the debtor's property. If the property is located in different places, the court first accepted the case for production, having exclusive jurisdiction. Swiss legislator does not divide foreign proceeding into basic and extra.

Swiss law applies to claims for recognition of the invalidity of transactions of the insolvent debtor. Such action may be brought foreign bankruptcy trustee (admini-

strator) or one of the creditors, who have this right. Swiss court which is competent to recognize foreign insolvency solution, also has competence to recognize foreign registry of creditor's requirements. In Switzerland recognized settlement or other similar proceeding, approved by the competent foreign authority.

I think, Swiss law offers a unique cross-border insolvency rules. These rules have a pragmatic character and aimed for maximum protection of local creditors. Swiss law provides an example of the original development of national legislation, an example of regulatory approval of across-the-border insolvency as an institution of private international law.

Belgian legislator followed suit in Switzerland in the Code of Private International Law of Belgium 2004 (art. 116–121 XIth unit «proceeding of the distribution of property in bankruptcy»). Across-the-border insolvency regulation is approved as an independent institution PIL. The Code contains a brief glossary of essential terms:

- "consideration of bankruptcy" is proceeding of the distribution of property in bankruptcy;
- «primary consideration» is the consideration of bankruptcy, which affects the whole debtor's property;
- «territorial consideration of bankruptcy» is a review of bankruptcy, affecting only the debtor's property, which is located in the state where the review was initiated;
- «regulation of insolvency» – this is European Union Regulation;
- «liquidator» is any person or body appointed on the basis of foreign decisions to control or disposition of debtor's assets.

As a general rule, Belgian courts have jurisdiction to open insolvency proceeding only in cases stipulated by art. 3 of European Union Regulation. In addition, they have jurisdiction:

1. to open the main consideration:
   - if the main place of business or statutory location of the legal entity is in Belgium,
   - if the domicile of an individual person is in Belgium,
2. to open the territorial considerations: if the debtor has an establishment in Belgium.

Recognition in Belgium of foreign court decision that opens the main proceeding, does not affect the competence of the Belgian Court of open the territorial review. The Belgian legislator fixed in the Code the model of primary, and secondary (territorial) proceeding. Consideration of bankruptcy, open in Belgium, and its effects are governed by Belgian law. Belgian law defines the conditions for a public hearing, conduct and closure. The consequences of a public hearing of the bankruptcy may be regulated by foreign law, without prejudice to the application of Belgian law. Application of foreign law may occur in the following cases:

1. Law is applied to a real right, adjusts the proprietary rights of third parties in respect of debtor's property located in the territory of another state.
2. The contract, which gives the right to acquire immovable property is governed by the law applicable to this contract.
3. The rights and obligations of the parties with respect to the payment system or financial market are governed by the law applicable to the system or market.
4. Labor contracts and labor relations are governed by the law applicable to an employment contract.
5. Debtor's right to property or things which shall be registered in the State Register are governed by the law applicable to these rights.

Actions for nullity, cancellation and impracticability acts adverse to all creditors an exception can obey the foreign law. From the perspective of the Belgian legislator, otherwise conflicting issues may contravene the rights of the parties. Foreign judicial decision can not produce any effect in Belgium, if it was made applicable law issues have been resolved otherwise than that prescribed in the Code.

Thus, foreign court should take into account the conflict rules of Belgian law, if such a decision must be recognized and enforced in Belgium.

Russian Regulation

In the Russian legislation the federal law 26.10.2002 «About insolvency (Bankruptcy)» acts. The Act mentions the term «the across-the-border insolvency», but it contains no legal definition of this institution. There was a question on the official website of the Federal Registration Service in 2005 – how should we understand the term the across-the-border insolvency? The Russian Federal Registration Service noted the absence of legal definitions and suggested sending to UNCITRAL Model Law of Across-the-Border Insolvency.

The law defines authorized in the across-the-border insolvency authorities, but does not set any rules relating to bankruptcy, associated with foreign law. In particular, the law does not provide the possibility of excitation in Russia further proceeding under the insolvency of foreign debtor.

In theory, international agreements about the legal aid constitute the legal basis for regulating the across-the-border insolvency in the Russia. At the moment, Russia did not sign any special international agreement, devoted to the across-the-border insolvency. Russian Bankruptcy Law provides that in the absence of international agreements the decisions of foreign insolvency courts recognize in the territory of the Russia on a reciprocal basis.

Currently, there is integrated, inter-regulation of the institution of the across-the-border insolvency in Russia. There are basic standards in its:

1. Rule in art. 65 RUSSIAN Civil Code. This Rule defines that bankruptcy is the special order of a corporation's liquidation.
2. Rule in art. 1202 RUSSIAN CC. This Rule defines, that the termination of a corporation is resolved by their personal law.
3. Some Rules in Russian Bankruptcy Law 2002 r. (art. 1, 131).
4. Some Rules in Russian Code of State's Arbitration Procedure about the order of recognition and enforcement of foreign judgments and cases involving foreign parties.

Russian and foreign creditors, who participate in the proceeding in the bankruptcy case, have equal rights. Art. 131 Russian Bankruptcy Law provides for the inclusion in the bankruptcy estate all debtor's property, including abroad. This suggests that the Russian bankruptcy law focuses on the implementation of the principle of universality.

If the Russian company is the parent company for foreign one, the bankruptcy petition of the Russian company does not serve under Russian law as grounds for the institution of the bankruptcy case of foreign company. Such bases are determined in accordance with applicable foreign law. A Russian court has no power to declare as bankrupt a foreign company registered abroad. However, Russian legislation gives the administrator the duty to take measures to search for, identify and return debtor's property, including those located abroad. Law of the State in whose territory the debtor's property is, shall apply to the foreign assets of Russian companies. If it is a subsidiary of a Russian legal entity, then the bankruptcy proceedings should apply foreign law. Russian legislation doesn't contain provisions regulating the bankruptcy of multinational companies.

Russian Bankruptcy Law (art. 1) provides for the recognition of foreign court's decisions of insolvency. Foreign bankruptcy trustee must apply to the court competent for the issuance of exequaturs and get an appropriate definition of acceptance. This position is broadly consistent with the provisions of UNCITRAL Model Law of Across-the-Border Insolvency.

Art. 248 Russian Code of State's Arbitration Procedure includes disputes, which are connected with establishment, liquidation or registration on Russian territory of legal entities in the exclusive competence of the Russian state arbitration courts. Thus, foreign decision to declare bankrupt of debtor registered in Russia, but having a center of main interests in another country, shall not be recognized.

Special complex conflict regulation of the across-the-border insolvency in Russian PIL is completely absent. There is no clearly articulated conflict rule in Russian PIL, which would determine the statute of the across-the-border insolvency. In Russian law doctrine expressed the view that Bankruptcy law is an act, which rules are lex fori concursus. Unfortunately, the Act does not allow to define the limits of application

of lex fori concursus or delimit its application to other conflict rules. For example, i is unclear which law should apply to labor relations related to bankruptcy, or how t set the law applicable to the real right of debtor.

Only conflict rule, which can be adequate to situations of across-the-border inso lvency, is art. 1202 RUSSIAN CC (about the application lex societatis of the insolven company to the questions of its creation, reorganization or liquidation). Such an in terpretation stems from that that the bankruptcy is a special order of liquidation o legal entity (art. 65 RUSSIAN CC, art. 149 Bankruptcy Law).

This conclusion was confirmed in practice of Russian International Commercia Arbitration: 2005 r. Russian organization filed a lawsuit from a failure of contractua obligations to the American firm. The American administrator in bankruptcy notifie that the defendant was under bankruptcy. For this reason, all proceedings against th defendant shall be suspended (art. 362 U.S. Bankruptcy Code).

Russian International Commercial Arbitration decided, that the questions of liq uidation relate to the personal statute of a legal entity and regulate his personal law According to art. 1202 RUSSIAN CC personal law the defendant is the law to the U.S (the defendant established and registered in Houston). In this regard, the ICAC foun that issues relating to bankruptcy, must also be addressed by U.S. law. On this basis the ICAC has stopped proceeding.

At the same time it should be noted that a rate art. 1202 RUSSIAN CC is not abl to provide the necessary conflict-law regulation of relations in the across-the-borde insolvency. In particular, this rule may not apply to legal relationships arising during rehabilitation procedures. Lex fori concursus is the main but not the sole conflict rul that determines the law applicable to the across-the-border insolvency. At the mo ment we have a unique situation – decisions of Russian courts of bankruptcy are no recognized and enforced abroad. The situation is mirrored in respect of foreign deci sions of bankruptcy in Russia – they are not recognized and enforced.