Conflicts and Solutions in the Jurisdiction of Transnational Insolvency

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Abstract: The determination of transnational insolvency jurisdiction is the premise and basis for solving the issue of transnational insolvency, which affects the choice of substantive law and the recognition and enforcement of judgments, and directly related to the immediate interests of the parties. How to properly coordinate the legal conflicts of transnational insolvency has become a topic of common concern to the international community. To resolve the conflict of jurisdiction of transnational insolvency to the greatest extent, this paper holds that legislators can adopt debtor centered standard to construct transnational insolvency jurisdiction distribution rules. In establishing the path of resolving jurisdiction conflicts, legislators can limit the jurisdiction standards themselves and set up agreement jurisdiction rules. In addition, this paper propose some legislative proposals on improving the jurisdiction of transnational insolvency of China.

1. Introduction

With the rapid development of economic globalization, the investment activities of multinational companies are developing at an unprecedented rate, resulting in an increasing number of transnational insolvency cases. Transnational insolvency involves complex legal issues, both the procedural law of insolvency and the substantive law of insolvency. Transnational insolvency is often related to a country's major economic interests, but there is currently no uniform legal framework for handling transnational insolvency around the world, so the courts in many countries tend to adopt national laws when handling transnational insolvency cases. However, there are great differences in insolvency legislation in various countries, so the legal conflict in the field of transnational insolvency is extremely fierce. How to properly coordinate the legal conflicts of transnational insolvency has become a topic of common concern to the international community.

China’s current legislation has many areas to be perfected on the issue of transnational insolvency, which leads to the embarrassing situation of irrelevant or contradictory relevant legal practices and the resulting inequality and inconsistency in the application of laws. This status quo is contrary to the basic rules of the WTO, which is not conducive to safeguarding the interests of China and the parties, but also directly affects the cooperation between China and other countries in the field of transnational insolvency. Therefore, China should learn from the more mature international and other countries' experience and perfect its legal system on transnational insolvency. On the basis of protecting the legitimate rights and interests of the parties in our country, we will promote China's foreign economic cooperation to a greater extent and make it more conducive to the formation and operation of China's socialist market economic system.

2. The Cause and Development Trend of Transnational Insolvency Jurisdiction Conflicts

2.1. Causes

As one of the conflicts of international civil and commercial jurisdiction, transnational insolvency jurisdiction conflicts not only have common causes as civil and commercial jurisdiction conflicts, but also have some unique causes due to their own complexity and particularity. Specifically, it mainly includes the following causes.

(1) The basic reason: collision of judicial sovereignty

On the issue of jurisdiction, all countries have a strong sense of sovereignty, and the judicial sovereignty of different countries will inevitably collide. In particular, British and American countries give judges great power in the establishment of jurisdiction. For example, a judgment made by a British court has jurisdiction as long as it can be effectively enforced, regardless of whether the defendant is in the UK or not. In the United States, in order to expand its jurisdiction, the law stipulates that as long as there are any related factors related to the United States in foreign-related civil cases, there is a minimum connection with the United States, and American courts have jurisdiction. It can be seen that it is very difficult to form a universally accepted standard for determining uniform jurisdiction under the trend of continuous expansion of jurisdiction. In transnational insolvency, countries compete for jurisdiction according to the principle of sovereignty, which is the basic reason for the conflict. In the current economic integration has become an irresistible trend of the times, the expansion of jurisdiction has resulted in the disconnection between law and economic reality, which will inevitably lead to conflicts.

(2) The direct cause: legislative differences in the criteria for determining jurisdiction

So far, apart from some bilateral treaties and regional rules on transnational insolvency jurisdiction, no international treaty has been generally accepted by all countries. In this case, when dealing with transnational insolvency cases, countries usually determine their jurisdiction according to the scope of application of national procedural law or the jurisdiction between courts. Due to the different legal traditions, economic interests and social policies of different countries, there are great legislative differences among countries to determine the standards of transnational insolvency jurisdiction. Therefore, objectively, it is very easy to cause a bankrupt debtor to be subject to the jurisdiction of multiple courts at the same time. Even if the same legislation is adopted for the determination standard of jurisdiction, the conflict of transnational insolvency jurisdiction may not be avoided due to different interpretations of the determination standard of jurisdiction and different understandings of the legal facts on which the jurisdiction is based. To sum up, in the absence of international treaty provisions, countries can independently determine the standards for determining the jurisdiction of transnational insolvency. The legislative differences include different understanding of the standards for determining the jurisdiction, which directly leads to the formation of jurisdiction conflicts. At the same time, with the continuous expansion of transnational insolvency jurisdiction, the degree of conflicts is further intensified.

(3) The root cause: interest struggle

Whether it is procedural law or conflict law, or the application of ultimate substantive law, it is related to the self-respect of state rights. In the judicial practice of transnational insolvency, the balance of multi-party interests is the main consideration for judges to decide whether to govern transnational insolvency cases in their discretion, and countries will also legislate broad criteria for determining jurisdiction in order to more effectively protect their own interests and national sovereignty. It can be seen that the conflict of interests, including the private interests between the parties and the public interests between countries, is the root cause of the conflict of jurisdiction in transnational insolvency.

As a result of the interest dispute, different countries apply different standards to determine the jurisdiction of transnational insolvency in order to try to expand their own jurisdiction, and overemphasize the protection of their own interests will inevitably form and intensify the jurisdiction conflict. We should treat the conflict of jurisdiction of transnational insolvency more rationally and explore the coordination method of the conflict more actively.

2.2. Development Trend

For a long time, courts in various countries have been competing fiercely for jurisdiction over transnational insolvency cases, and they have tried their best to expand their jurisdiction by using various bases and principles. With the increasing dependence of countries on international civil and commercial exchanges, when they exercise their jurisdiction over transnational insolvency cases, they also take a certain degree of self-restriction to achieve the coordination of international civil

jurisdiction conflicts. In terms of jurisdiction, because of the sovereignty of each country and the nature of international civil procedure law itself, and each country is restricted by the indirect jurisdiction of other countries, which makes each country have to make great efforts in legislation to find the necessary balance between expanding its jurisdiction and self-limitation.

From the perspective of judicial practice in recent years, the principles of self-restraint of international civil jurisdiction in Britain and the United States mainly include "the principle of inconvenient court", "the principle of first acceptance", etc. In judicial practice, the United Kingdom and the United States give the judges greater discretion to refuse to accept or suspend the lawsuit brought by the plaintiff according to the jurisdiction agreement between the two parties. In essence, in the field of transnational insolvency, the expansion and self-restriction of jurisdiction of each country is also an indirect reflection of foreign exchange policies of each country. As long as the trend of civil and commercial exchanges in the world remains the same, as long as the sovereign countries still exist, such conflicts are inevitable. With the continuous expansion of the field of international civil and commercial exchanges, countries' dependence on international economy will be further deepened, and countries will always try their best to adapt their foreign-related civil jurisdiction system to the development of international civil jurisdiction system.

3. Solutions to the Conflicts of Jurisdiction in Transnational Insolvency

There is no doubt that jurisdiction is not only the premise of reasonable trial of transnational insolvency cases, but also related to the recognition and enforcement of case judgments. How to resolve the conflict of transnational insolvency jurisdiction and how to choose the path is one of the problems that need to be considered rationally by the insolvency legislators of contemporary countries. Here we try to propose some feasible solutions to the conflict of transnational insolvency jurisdiction, so as to make a reasonable reference in the construction of a conflict resolution path in China.

3.1. Self-Limitation of National Jurisdiction

In the long-term practice of resolving transnational insolvency conflicts, the concept of self-limitation of national jurisdiction has reached international consensus, that is, allow the most suitable court exercise insolvency jurisdiction can effectively ease the conflict of international insolvency jurisdiction. There are two ways for countries to restrict their own jurisdiction as follow.

(1) Self-limitation of the establishment standard of jurisdiction

Countries try not to adopt the "long arm jurisdiction" or "minimum contact principle" in the legal provisions of establishing the insolvency jurisdiction standards. Otherwise, it will mean that the insolvency procedure and the judgment will not be recognized and enforced by other countries. In the long run, the result can only be mutual defeat. To adopt common jurisdiction standards that can be accepted by the public is conducive to maintaining a stable judicial order of transnational insolvency. Without coordination and cooperation, it is impossible for all countries to maximize their economic benefits. At the same time, the economic model that is contrary to the trend of global economic development cannot stay in the highland forever.

So, what kind of standard is adopted as the jurisdiction allocation standard that is most acceptable to the legislators of various countries? Based on the investigation of the determination standards of insolvency jurisdiction of countries and international organizations around the world, this paper holds that the *Model Law on Cross Border Insolvency* formulated by the United Nations Commission on international trade law should be generally accepted. When establishing the rules of jurisdiction distribution, each country may use them for reference and establish reasonable and general insolvency jurisdiction standards on the basis of safeguarding national sovereignty.

(2) Self-limitation in the exercise of jurisdiction

We think that the "inconvenient court principle" developed in practice and the modern "international courtesy principle" can effectively mitigate conflicts. The so-called "inconvenient court principle" means that a country's court can at its discretion consider that it is inconvenient to exercise jurisdiction or is unfair to the other party. This method of transferring jurisdiction is not only

respect for the sovereignty of other countries, but also a panacea for easing the conflict of jurisdictions. However, it requires countries to change their attitudes towards traditional international civil and commercial jurisdictions and consciously restrict their national jurisdictions from unintentional expansion. The resurgence of "international courtesy principle" is the product of countries' search for conflicts of jurisdiction, and it is also determined by the complexity and particularity of transnational insolvency cases. Undoubtedly, the pursuit of the best interests of each country is the main line of modern international economic exchanges, and the parallel jurisdiction of transnational insolvency cases wastes litigation resources obviously has not reached the maximum economic benefits. Firstly, "international courtesy principle" could help to coordinate conflicts of jurisdiction; secondly, since of close relationship with other countries, the state has given up jurisdiction or suspended or terminated the ongoing insolvency proceedings, saving the resources of litigants, and such judgments have also been recognized and enforced. Finally, the domestic creditors have been relieved. For the domestic creditors, this is obviously better than holding the unrecognized judgments. Therefore, the "international courtesy principle" should be used for reference in judicial practice by all countries.

3.2. Coordination and Cooperation among Countries

If countries can limit their own jurisdiction, it is not far away to achieve international consensus and cooperation. By unifying the distribution rules of transnational insolvency jurisdiction through international legislation, jurisdiction conflicts can be solved smoothly. The *Model Law on Cross Border Insolvency* issued by the United Nations Commission on International Trade Law regulates the recognition of other countries' insolvency procedures and tries to solve various problems of jurisdiction. However, this bill does not propose a practical solution to the substantive issue of insolvency jurisdiction. Later in 2002, the *EU Insolvency Rules* came into effect, which has coordinated the differences in the insolvency jurisdictions of most EU countries and has accelerated the integration of EU transnational insolvency laws. This rule provides two kinds of insolvency procedures and their application, which effectively solves the jurisdiction conflict of insolvency cases in the EU region, and also provides a model for similar insolvency systems in other countries, but its inevitable defect is the applicable regional limitation.

As far as the present stage is concerned, this paper holds that it is obviously unrealistic to solve all jurisdictional problems through international uniform legislation. This paper proposes that regional international treaties are a powerful supplement to prevent conflicts of jurisdiction, that is, to establish the contracting parties within certain limited area to reach a cooperation treaty, which is committed to coordinating the insolvency jurisdiction system in the region, easing conflicts in insolvency procedures and rescuing bankrupt enterprises. In the course of exercising, it also has a directional guidance to the insolvency system of non-contracting parties, and the growing regional treaties can provide the latest legislative and practical experience for international unified legislation. On the one hand, the limited scope of international treaty coordination is conducive to reaching agreement. International treaties are not as large as the scope of international unified legislation. The reason why an agreement can be reached is necessarily a country with a similar legal system, which is conducive to reaching an agreement and enables efficient and smooth settlement of insolvency cases. On the other hand, international treaties help promote a win-win situation for economic interests. As we all know, to reach an agreement, there must be a compromise between the parties, and the two parties to the agreement must be an area with frequent economic and trade. For the long-term interests, the two parties are willing to give in, and the economic interests of the parties are maximized, which is beneficial to economic development.

3.3. Case Negotiation

Even if the international legislation or international treaties are very complete and comprehensive, they cannot solve all transnational insolvency cases, let alone many issues already involved due to foreign affairs. Therefore, the case negotiation solution is particularly important. Case consultation is an effective practice widely adopted by many countries in practice. It is a way for specific cases to be resolved by the court and the parties in the negotiation of conflicts of jurisdiction. In detail, in the case,

the parties and the court reached an agreement on jurisdiction, and the agreement only applies to the case. This article believes that China should also learn from this solution. On the one hand, this kind of agreement is flexible and easy to negotiate. In future litigation, conflicts can be resolved at any time, which will undoubtedly facilitate the recognition and enforcement of subsequent judgments. As far as the entire insolvency proceedings are concerned, it will proceed efficiently and smoothly. On the other hand, in practice, this method of resolving jurisdictional conflicts in individual cases is flexible and efficient, which is conducive to a win-win situation and wins favor from both parties.

3.4. Agreement Jurisdiction

Agreement Jurisdiction reduces the conflict of jurisdiction in the traditional international civil and commercial cases because it incorporates the factors of the parties, so it has received international attention. Agreement jurisdiction is an extension of the principles of freedom of contract and autonomy of will in the field of international civil and commercial affairs. In many case law systems, many countries recognize the jurisdiction court chosen by the parties through consultation, but the countries of civil law system do not allow the parties to choose the jurisdiction court through consultation. The reason why the two legal systems have the opposite choice is that they choose different value trade-off standards. Once both parties choose the court of jurisdiction, it means to determine the procedure of jurisdiction and the implied applicable law. At the same time, the result of the judgment is expected to facilitate the recognition and enforcement of the judgment, so as to effectively prevent the occurrence of the conflict of jurisdiction. However, the defect of the jurisdiction by agreement lies in the wide range of choice of the parties in the jurisdiction by agreement. Sometimes it is not conducive to the settlement of cases or the waste of litigation resources to choose unrelated courts due to lack of professional knowledge.

Firstly, agreement jurisdiction allows the parties to choose the court of jurisdiction by agreement, which can effectively prevent the conflict of jurisdiction. Secondly, agreement jurisdiction is conducive to the smooth implementation of transnational insolvency cases. Similar to general foreign civil and commercial cases, if the competent court is selected through negotiation, the insolvency procedure and applicable law will be locked quickly, which paves the way for the litigation process. Thirdly, agreement jurisdiction makes the recognition and enforcement of transnational insolvency judgment possible. It is undeniable that the compromise and concession of both parties are inevitable in the jurisdiction agreement, but the advance of the game of rights and obligations has immeasurable practical significance for solving the whole case.

In conclusion, this paper holds that legislators can adopt debtor centered standard to construct transnational insolvency jurisdiction distribution rules. In establishing the path of resolving jurisdiction conflicts, legislators can limit the jurisdiction standards themselves and set up agreement jurisdiction rules.

4. Legislative Proposals on Improving the Jurisdiction of Transnational Insolvency

4.1. Promote the Coordination of Jurisdiction

Due to the differences in the provisions of insolvency law in the domestic laws of various countries, China can adopt the positive parts of international legislation to promote mutual coordination. In particular, the provisions of the *Model Law on Cross Border Insolvency* can be adopted to distinguish between master-slave insolvency proceedings and to coordinate parallel insolvency at home and abroad.

The *Model Law on Cross Border Insolvency* specially regulates parallel procedure. The court of a country may recognize that the foreign procedure initiated at the center of the main interest is the main procedure, while the place of the business office initiates the foreign non-main procedure. Once a procedure is recognized as a foreign main procedure, it has a series of legal effects of suspension or termination. If the litigation action against the debtor's property is stopped, the domestic procedure can still be initiated and the effectiveness takes precedence. If the domestic non-main procedure has residual property, the main procedure should be transferred.

This paper believes that China can adopt the *Model Law on Cross Border Insolvency* to include the main interest center and the business office, allowing the master-slave insolvency proceedings to exist simultaneously and be effective. Under such circumstances, China can resolve conflicts caused by differences in insolvency laws in other countries from the legislative level, thereby protecting the interests of our creditors and the stability of the domestic market order through the insolvency procedures within our country.

4.2. Clarify the Distribution of Jurisdiction

China's provisions on jurisdiction distribution of transnational insolvency are not clear, and there is no specific provisions on the jurisdiction of transnational insolvency cases. Therefore, the practice can only be operated according to the provisions of the general domestic insolvency jurisdiction. This paper holds that China can draw lessons from EU legislation to clarify the jurisdiction of transnational insolvency.

First, because our country still only applies the common civil insolvency rules to regulate the transnational insolvency cases, we think that we can stipulate the jurisdiction of the transnational insolvency cases separately and make clear the jurisdiction of the transnational insolvency cases. For instance, clearly list the jurisdiction provisions of transnational insolvency in the *Insolvency Law*. Second, theoretically, for transnational insolvency cases, according to the principle of territoriality, the most appropriate court to exercise jurisdiction is the local court that has the closest and direct economic relationship with the bankrupt debtor. At present, the main offices and places of registration established in China's insolvency law have some positive points, but they are different from the internationally accepted regulations. In the *Model Law on Cross Border Insolvency* and *EU insolvency procedure rules*, it not only presumes the registered place of business as the center of main interests, but also marks the place where the debtor's place of business is included in the jurisdiction. This paper holds that China can absorb the jurisdiction sign of "debtor's business office" in legislation, so as to coordinate jurisdiction with foreign countries.

To sum up, this paper holds that the *Insolvency Law* of China can stipulate that "transnational insolvency cases shall be governed by the court of the debtor's domicile or the debtor's principal place of business". The expansion and refinement of jurisdiction is conducive to the courts in China to deal with relevant transnational insolvency cases through specific transnational insolvency procedures in Chinese law, and protect the interests of creditors in China. This is in line with the legislative purpose of article 265 of the *Civil Procedure Law* of China, which is to protect the interests of creditors.

4.3. Strengthen Jurisdiction Cooperation

Although the article 265 of the *Civil Procedure Law* has the nature of "long arm jurisdiction", the court of our country still can't jurisdiction without the jurisdiction mark. Therefore, this paper holds that under the premise of applying the provisions of the insolvency law on the jurisdiction of transnational insolvency, on the one hand, we should respect the effectiveness of foreign insolvency proceedings, on the other hand, we should strengthen international cooperation.

First, traditional international comity principle or inconvenient court principle can be applied to solve problems encountered in practice. When it is needed, we can voluntarily give up jurisdiction so as to reduce the burden of domestic courts, and it is more able to leave the problem to a more suitable court. For example, in some civil law countries, when the laws of two or more countries have jurisdiction over a insolvency case, the principle of prior acceptance is adopted, that is, it is under the jurisdiction of the court that first accepts the insolvency application, while the state of post acceptance should give up the jurisdiction.

Second, China can try to join or even organize the negotiation of relevant international treaties and conventions and seek consensus with other countries on the issue of transnational insolvency jurisdiction. Since transnational insolvency negotiations often involve multiple interests, and the difficulty of negotiation increases sharply, so that there is currently no relevant international public authority on transnational insolvency jurisdiction, which obviously hinders international cooperation. Therefore, China can make its own contribution to the facilitation of international treaties, promote international cooperation and help to win national interests. In actual cases, if there is no jurisdictional

sign in the country, this article believes that China can negotiate and cooperate with foreign courts to fill the gaps in the current domestic legislation through negotiation, so as to resolve transnational insolvency cases in more detail, so that protect the legitimate interests of creditors in China.

5. Conclusion

Transnational insolvency is often related to a country's major economic interests, but there is currently no uniform legal framework for handling transnational insolvency around the world. Since there are great differences in insolvency legislation in various countries, so the legal conflict in the field of transnational insolvency is extremely fierce. In this paper, through the analysis of causes development trend of transnational insolvency jurisdiction, it is concluded that the dispute over the interests of various countries directly lead to fierce competition for jurisdiction over transnational insolvency cases. In order to resolve the conflict of jurisdiction of transnational insolvency to the greatest extent, this paper holds that legislators can adopt debtor centered standard to construct transnational insolvency jurisdiction distribution rules. In establishing the path of resolving jurisdiction conflicts, legislators can limit the jurisdiction standards themselves and set up agreement jurisdiction rules.

In addition, China's current legal provisions are too simple for the allocation of insolvency jurisdiction, and there is a certain difference from the internationally customary way, which can easily lead to conflict. Therefore, this paper recommends that China can adopt the master-slave insolvency procedure under the *Model Law on Cross Border Insolvency* to promote coordination by amending the *Insolvency Law*, by promoting the coordination of jurisdiction, clarifying the distribution of jurisdiction and strengthening jurisdiction cooperation.

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