

APPLICATION OF THE INSTITUTE OF RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS ON BANKRUPTCY IN ECONOMIC COURTS

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Abstract

This article examines the main features of the regulation and problems of the functioning of the institution of transnational bankruptcy, as well as the problems of the lack of a mechanism for legal regulation of the recognition and enforcement of relevant judicial acts in the Republic of Uzbekistan. The author, based on the study of the legal regulation of the institution of recognition and enforcement of foreign judicial acts in insolvency (bankruptcy) cases in international practice and national legal orders, proposes prospects for the development of the national bankruptcy decision recognition regime.

Keywords: Debtor, creditors, bankruptcy, insolvency, transnational insolvency, recognition and enforcement of foreign judicial acts.

Introduction

The effectiveness of the execution of a judicial act is one of its main qualities, which business pays attention to. In most cases, obtaining a positive decision does not in itself ensure the restoration of violated rights. Accordingly, the more effectively the decision of a particular jurisdictional body can be executed, the more attractive it will be from a business point of view. As practice shows, sometimes the main difficulties arise at the stage of enforcement of the decision, making the process of its implementation longer and more costly even in comparison with the dispute itself.

In modern economic conditions, the problem of the effect of court decisions abroad in relation to cross-border insolvency, which is based on the concept of main and secondary bankruptcy proceedings, is becoming more and more relevant. If a person is abroad, it is more difficult to bring him to justice and recover money. When considering such cases, many issues are raised related to the replenishment of the liquidation estate, challenging the debtor's transactions and the return of its assets.

The greatest difficulty in cross-border bankruptcy is caused by the subsequent execution of a judicial act. It is extremely difficult for creditors to interact with unscrupulous debtors located abroad. This creates obstacles to the protection of their economic rights.



Disputes with foreign persons are a complex category, since territorial remoteness implies the risk of not notifying the debtor, as well as difficulties in finding property.

The main problem that has to be faced is the opening of independent and uncoordinated procedures subject to the law of different states. Thus, declaring a debtor bankrupt is regulated only by domestic law, unless otherwise provided by an international treaty, and since there are none, the court will fully apply only national legislation.

Differences in legal regulation lead to the fact that creditors are not provided with equal access to the debtor's assets, domestic creditors always have an advantage.

The commencement of independent proceedings in States where the debtor has assets is called the parallel proceeding model, in contrast to which the single proceeding model is proposed. According to this model, all the main procedures must take place in one state.

Almost all existing international acts adopted in the field of cross-border insolvency are based on the principle of automatic recognition of foreign bankruptcies (Scandinavian Bankruptcy Convention of 1933;¹ EU Regulation.

"On Insolvency Procedures";² Unified Act of OHADA "On the Organization of Collective Liquidation Procedures" of 1998;³ Principles of cooperation in bankruptcy cases between NAFTA countries;⁴ Principles and Recommendations of the World Bank on Creating an Effective Insolvency System and Protecting the Rights of Creditors;⁵ the Concordat on Cross-Border Insolvency, prepared by the Committee of Section J of Commercial Law of the International Bar Association;⁶ Montevideo treaties on international commercial law of 1889 and 1940).⁷ Cross-border insolvency issues are included in the Bustamante Code⁸. The Nordic and Benelux treaties deal entirely with cross-border insolvency.

There are also cases of concluding bilateral international treaties on these issues. In particular: the Treaty on International Commercial Law,⁹ the Treaty on International Commercial Law¹⁰ and the Treaty on International Procedural Law.¹¹

To date, UNCITRAL has developed the Model Law on Cross-Border Insolvency (Bankruptcy) of 1997¹², on the basis of which laws have been adopted in a number of countries. In particular, in the USA, Great Britain, Japan, Australia, Greece, Canada, New Zealand, Serbia, Romania, Mexico, Slovenia, etc.¹³ Model laws on insolvency in general have been developed within the

¹ Scandinavian Convention on Bankruptcy between Denmark, Sweden, Norway, Finland and Iceland (Copenhagen, 1933).

² The Regulation of the European Parliament "On Insolvency Procedures" No1346/2000 of 29.05.2000 entered into force on 31.05.2002).

³ 1998 Unified Act of OHADA of the Contracting Parties to the Treaty on the Establishment of Collective Procedures for the Liquidation of Debtors (as amended in 2015).

⁴ General Principles of Cooperation in Cross-Border Insolvency for NAFTA Member States.

⁵ Published by the World Bank in April 2001

⁶ Concordat on Cross-Border Insolvency, prepared by the Committee of Section J of Commercial Law of the International Bar Association at the end of 1990.

⁷ Treaty on International Commercial Law (Montevideo, 1889)., Treaty on International Commercial Law (Montevideo, 1940). Treaty on International Procedural Law (Montevideo, 1940).

⁸ Code of Private International Law (Codex Bustamante) Havana, 20.03.1928 (Annex to the Convention on Private International Law, entered into force on 25.11.1928).

⁹ Treaty on International Commercial Law (Montevideo, 1889).

¹⁰ Treaty on International Commercial Law (Montevideo, 1940).

¹¹ Treaty on International Procedural Law (Montevideo, 1940).

¹² UNCITRAL Model Law on Cross-Border Insolvency (United Nations Commission on International Trade Law, Vienna, 30.05.1997).

¹³ Official website of the United Nations Commission on International Trade Law (UNCITRAL) http://www.uncitral.org/uncitral/ru/uncitral_texts/insolvency/1997Model_status.html.



framework of the Organization for the Harmonization of Commercial Law of African Countries and the Commonwealth of Independent States (CIS). Such a process of harmonization has a positive effect on the development of legislation in this area.

The sources of legal regulation of cross-border bankruptcy in the CIS include: the Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Cases;¹⁴ Agreement on the Procedure for Resolving Disputes Related to the Implementation of Economic Activities;¹⁵ Agreement on the Procedure for Mutual Enforcement of Arbitration, Economic and Economic Court Decisions in the Territories of the Commonwealth Member States;¹⁶ CIS Model Law on Insolvency.¹⁷

The drafters of each of the international instruments dealing with cross-border insolvency have tried to find the best way to address the problem.

For example, the European Convention on Certain International Aspects of Bankruptcy¹⁸ rejects the theory of single proceedings and regulates the issues of opening primary (in the center of the debtor's business activity, i.e. the location of the main management body) and secondary (at the location of assets) proceedings. Secondary proceedings can be opened only if there are primary proceedings and only for the preferential satisfaction of the claims of creditors in the State of commencement of such proceedings. The remaining property goes to the general liquidation mass and is distributed within the framework of the main proceeding.

Another option (or rather the first of those proposed by the Convention) to solve the problem is to recognize the powers of the court manager to manage and dispose of assets not only in the state of the bankruptcy procedure, but also in the state where the debtor's assets are located.

Although the convention provides States with a fairly wide range of reservations, it has not yet entered into force, with seven signatories to date and only one ratification.

The EU Convention on Cross-Border Insolvency,¹⁹ on the other hand, tries to find a balance between the models of single and parallel proceedings. On the one hand, the Convention allows for the commencement of secondary proceedings in the state where the bankruptcy branch is located and is limited only to those assets that are located in this state. On the other hand, the liquidator of the main proceeding (also opened in the center of the bankrupt's business activity) may request the suspension of secondary proceedings production if it can contribute to the maximum increase in the value of assets or is necessary for the development of an amicable agreement.

Thus, secondary proceedings are made dependent on the course of the main proceeding and the interests of creditors of the main proceeding. This dependence can also be traced in the fact that only those creditors whose claims are recognized in the main proceedings are admitted to

¹⁴ Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (Minsk, 22.01.1993, entered into force on 19.05.1994, ratified by the Resolution of the Supreme Soviet of the Republic of Uzbekistan dated 06.05.1993 No. 825-XII, entered into force for the Republic of Uzbekistan on 19.05.1994).

¹⁵ Agreement on the Procedure for Resolving Disputes Related to the Implementation of Economic Activity (Kiev, 20.03.1992, entered into force on 19.12.1992, for the Republic of Uzbekistan on 06.05.1993).

¹⁶ Agreement on the Procedure for Mutual Enforcement of Arbitration, Economic and Economic Judgments in the Territories of the Commonwealth Member States (Moscow, 06.03.1998, entered into force on 09.01.2001).

¹⁷ Model Law "On Insolvency (Bankruptcy)" (adopted at the tenth plenary session of the Interparliamentary Assembly of the CIS Member States by Resolution No. 10-15 of 06.12.1997).

¹⁸ European Convention on Certain International Aspects of Bankruptcy (Istanbul, 05.06.1990, within the framework of the Council of Europe).

¹⁹ The European Union Convention on Cross-Border Insolvency (1995) has not entered into force.



secondary proceedings. The property remaining after the secondary proceedings is also transferred to the general liquidation mass of the main production.

The provisions of the Convention are almost completely reproduced in the EU Insolvency Procedure Regulation.²⁰ Denmark is not the only country bound by the provisions of the Rules, but is directly applicable in other countries. A decision of a court or other competent authority to commence insolvency proceedings made in accordance with the Rules is subject to immediate recognition in all EU States without any formalities. A waiver is possible only in a number of cases, for example, contrary to public policy. Both Conventions are aimed at creating international cooperation in the field of cross-border Insolvency.

To a certain extent, this is facilitated by the UNCITRAL Model Law on Cross-Border Insolvency, which has absorbed the experience of work on both the Istanbul Convention of 1990 and the European Community Convention on Insolvency Proceedings, and the practice of dealing with cross-border insolvency cases, therefore, its incorporation into the national legislation of the UN member states would introduce useful amendments and additions that would help to eliminate gaps in the insolvency legislation in the field of cross-border cooperation of courts and official representatives of proceedings, ensuring the protection of the interests of all interested parties, and the most effective use of the debtor's assets.

The Model Law is intended solely at the substantive unification of insolvency law, leaving procedural issues outside its scope.

In accordance with this law, the state can give a body competence in the field of cross-border bankruptcy. This body can accept petitions from creditors, foreign courts, and itself apply with appropriate petitions to foreign bodies. The state may authorize a domestic person or body to perform actions abroad that are necessary within the framework of the bankruptcy procedure. A special chapter regulates the access of foreign representatives and creditors to justice. They may make appropriate applications to ensure the conduct of insolvency proceedings commenced in a foreign State, as well as initiate separate proceedings in accordance with the law of the forum. Foreign creditors should not be discriminated against.

An interesting feature of the Model Law is that, when notifying foreign creditors, it is not necessary to send an order for legal assistance, creditors are notified directly. This significantly reduces the time required for procedures and is in the interest of both domestic and foreign creditors. And with regard to judicial assistance and cooperation of the competent authorities, it directly establishes the direct procedure for relations.

Legal assistance in accordance with the law includes: the designation of a person or institution that will perform actions at the direction of the court; the communication of information by any means that the court deems appropriate; coordinating the management and supervision of the debtor's assets and business transactions; approval or use by courts of coordination agreements and coordination of concurrent proceedings with respect to the same debtor.

It is also important to recognize foreign production as the main one. It allows creditors and representatives to obtain management of the debtor's assets in this state, to suspend the implementation of any enforcement procedures. Recognition of foreign proceedings as the

²⁰ European Union Insolvency Procedure Regulation No 1346/2000 of 02.03.2000, which entered into force on 31.05.2002.



main one is intended to subordinate the management and disposal of assets to the decisions of a foreign authority.

Once recognized, proceedings may be initiated in a domestic court, which the Model Law refers to as parallel, but which must be coordinated with the main foreign court or several foreign courts.

Thus, the rules of the UNCITRAL Model Law relating to the recognition and enforcement of foreign judgments in bankruptcy proceedings in the absence of a universal international treaty on the subject are intended to ensure the predictability of the outcome of the proceedings in terms of the prospects for enforcement abroad.

Foreign decisions in bankruptcy cases are qualitatively different from other decisions of foreign courts. Such court decisions, if presented for enforcement, may potentially fall under the influence of imperative (super-imperative) rules or under the public policy clause due to the fact that the share of public law rules in the insolvency legislation is quite large.²¹

Due to the specifics of these cases, the issues of recognition and enforcement of decisions in bankruptcy cases are excluded from the scope of regulation of most universal international treaties relating to the cross-border circulation of judicial acts.

As already noted, international legal regulation seeks to recognize and enforce foreign bankruptcy decisions automatically, which requires the conclusion of international treaties. However, Uzbekistan today is not a party to almost any such multilateral treaty. It follows that domestic courts are not competent to initiate insolvency proceedings against a foreign legal entity.

It should also be noted that the decisions of the International Commercial Arbitration Courts (ICAC) have an important advantage in comparison with the decisions of state courts: they can be enforced almost all over the world on the basis of the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10.06.1958).²²

Meanwhile, recognition and enforcement of foreign bankruptcy judgments is possible in the presence of a bilateral international treaty. Unfortunately, Uzbekistan has not yet signed a single such treaty. As for the Chisinau²³ and Minsk²⁴ Conventions on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters, the Hague Convention on Civil Procedure,²⁵ as well as the Kiev Agreement on the Procedure for Resolving Disputes Related

²¹ See: Afonin V.E., Kondrat E.N., Kovyazin V.V., Murmuridis P.E. Recognition and Enforcement of Foreign Judgments and Arbitrations in Insolvency Cases in International Private Law as One of the Most Relevant Problems of the Institute of Cross-Border Insolvency // Bulletin of St. Petersburg University of the Ministry of Internal Affairs of Russia. 2006. № 4. P. 101.

²² Uzbekistan has acceded to this Convention in accordance with the Resolution of the Oliy Majlis of the Republic of Uzbekistan dated 22.12.1995 No. 184-I "On Accession to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards dated June 10, 1958" (Entered into force on 07.02.1996).

²³ Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (Kishinev, 07.10.2002), Uzbekistan acceded to this Convention in accordance with the Law of the Republic of Uzbekistan dated 26.2019 No ZRU-554 (Entered into force on 27.04.2004).

²⁴ Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Cases (Minsk, 22.01.1993), ratified by the Resolution of the Supreme Soviet of the Republic of Uzbekistan of May 6, 1993 No. 825-XII "On Ratification of the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Cases" (Entered into force for the Republic of Uzbekistan on 19.05.1994).

²⁵ Convention on Civil Procedure (The Hague, 01.03.1954), ratified by the Resolution of the Oliy Majlis of the Republic of Uzbekistan dated 22.12.1995 No 183-I "On Ratification of the Hague Convention on Civil Procedure of March 1, 1954", which entered into force on 06.12.1996 for the Republic of Uzbekistan.



to the Implementation of Economic Activities,²⁶ to which the Republic of Uzbekistan is a party, these international treaties do not regulate bankruptcy relations.

Moreover, there is no special law on cross-border insolvency in Uzbekistan, and the current Law of the Republic of Uzbekistan "On Insolvency" also²⁷ does not mention issues related to cross-border insolvency.

It should be noted that the Russian legislation on insolvency²⁸ provides for the recognition in the territory of the Russian Federation of decisions of courts of foreign states in bankruptcy cases, in accordance with international treaties of the Russian Federation. At the same time, it makes an exception to the mentioned rule: in the absence of international treaties of the Russian Federation, decisions of courts of foreign states in bankruptcy cases are recognized on the basis of reciprocity, unless otherwise provided by federal law. Russia can consider cases, including cross-border bankruptcy.

This rule is consistent with the rule on the recognition and enforcement of foreign court decisions provided for in article 248, paragraph 1, of the Economic Procedure Code of the Republic of Uzbekistan, according to which decisions of foreign courts and arbitral tribunals adopted by them in disputes and other cases arising in the economic sphere are recognized and enforced by the economic courts of the Republic of Uzbekistan, if the recognition and enforcement of such decisions is provided for by the relevant international courts treaties and legislation of the Republic of Uzbekistan.

In the field of cross-border insolvency, to a much greater extent than in other areas of private international law, there is a desire for each state to protect its public interests. The public interests of different states are different.

The insolvency (bankruptcy) legislation of some states is pro-creditor (the purpose of liquidating the debtor and satisfying the creditors' claims prevails), while others are pro-debtor (the goal of restoring the debtor's solvency prevails).

In the legal regulation of cross-border insolvency in the Republic of Uzbekistan, it is necessary to solve two main problems:

- 1) recognition by the legislation of the state of decisions of foreign courts and their execution;
- 2) adoption of international Conventions governing cross-border insolvency.

The first problem can be fully solved within the framework of national legislation. The second requires WTO member states to choose one of several international conventions governing insolvency.

In connection with the further integration of Uzbekistan into international economic relations, cross-border insolvency issues will certainly require their legislative solution.

In order to develop legal cooperation with other countries in the field of bankruptcy and improve the investment climate in Uzbekistan, it is advisable to establish a national legal regime for recognizing foreign bankruptcies. Therefore, there is now a need to legislate a cross-border insolvency model that will adequately meet the challenges faced by judicial practice.

²⁶ Agreement "On the Procedure for Resolving Disputes Related to the Implementation of Economic Activities" (Kiev, 20.03.1992), ratified by the Resolution of the Supreme Council of the Republic of Uzbekistan. dated 06.05.1993 No 826-XII "On Ratification of the Agreement on the Procedure for Resolving Disputes Related to the Implementation of Economic Activity" (Entered into force for the Republic of Uzbekistan on 06.05.1993).

²⁷ Law of the Republic of Uzbekistan "On Insolvency" dated 12.04.2022 No ZRU-763.

²⁸ Paragraph 6 of Article 1 of Federal Law No. 127-FZ of 26.10.2002 "On Insolvency (Bankruptcy)".



Based on the study of the legal regulation of the institution of recognition and enforcement of foreign judicial acts in insolvency (bankruptcy) cases in international practice and national legal orders, it is possible to identify the following trends that demonstrate the prospects for the development of the national regime for the recognition of foreign bankruptcy decisions.

First, cross-border insolvency should be governed by a separate law based on the UNCITRAL Model Law on Cross-Border Insolvency, which would allow the relationship to be settled with a certain group of countries, in particular common law countries, subject to their incorporation of the Model Law into national law.

A model law developed on the basis of modern generally acceptable international standards could be of considerable assistance in eliminating the existing gaps in national legislation in terms of regulating the recognition and enforcement of foreign judgments not only in bankruptcy cases, but also in civil disputes in general. Improvement of national legislation on the basis of the said Model Law would contribute to increasing the attractiveness of the jurisdiction of our state, since it would ensure greater predictability, certainty of the result in the issue of issuing an exequatur, including in bankruptcy cases, timeliness and efficiency of this procedure, as well as guarantee closer cooperation between countries in the field of cross-border insolvency.

International cooperation to simplify cross-border bankruptcy procedures will facilitate the recognition and enforcement of judgments in other jurisdictions.

Secondly, it is necessary to work on the search for conditions for accession to the European Convention on Certain International Aspects of Bankruptcy of 1990, which will make it possible to regulate cross-border bankruptcy relations with the countries participating in the said Convention, provided that it enters into force.

Thirdly, on the basis of the principles and approaches contained in the EU Convention on Cross-Border Insolvency, the Regulation of the European Parliament "On Insolvency Procedures", the Model for Regulating Cross-Border Insolvency in the CIS, it is also necessary to develop a Cross-Border Insolvency Agreement for the CIS member countries.

Fourth, it is necessary to conclude bilateral agreements between Uzbekistan and other countries, especially those that have intensive economic relations with our country. In such cases, it is appropriate to use the experience of countries that have such agreements. For example, France and Italy have concluded the Convention on the Enforcement of Judgments in the Field of Civil and Commercial Law²⁹ of June 3, 1930, which provides that judicial proceedings instituted in the State of principal residence of the debtor extend to the territory of another State Party to the Convention, but prohibits the initiation of another procedure in that country.

Summing up, I would like to note once again that the institution of cross-border bankruptcy is of paramount importance at the present stage of development of international private law

²⁹ Convention on the Enforcement of Judgments in Civil and Commercial Law of 03.06.1930



relations. Despite the role assigned to this procedure, in practice many problems arise, one way or another related to the lack of both international legal regulation and more detailed legislative regulation at the level of national law.

Cross-border insolvency is a matter of private international law, is supranational in nature and should be regulated in national legislation by an independent law that facilitates the use of conflict of laws rules.

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20. Regulation of the European Union "On Insolvency Proceedings" No 1346/2000 of 02.03.2000, which entered into force on 31.05.2002;
21. UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10.06.1958);
22. Law of the Republic of Uzbekistan "On Insolvency" dated 12.04.2022 No ZRU-763;
23. Clause 6 of Article 1 of Federal Law No. 127-FZ of October 26, 2002 "On Insolvency (Bankruptcy)";
24. Convention on the Execution of Decisions in the Field of Civil and Commercial Law of 03.06.1930.

