EVROPSKÉ MEZINÁRODNÍ ÚPADKOVÉ PRÁVO - HRANICE SOUKROMÉHO A VEŘEJNÉHO PRÁVA

EUROPEAN INTERNATIONAL INSOLVENCY LAW – A DIVISION BETWEEN PRIVATE AND PUBLIC LAW?

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Abstract

Typical feature of the central European legal discourse, especially in the Czech Republic, is to think of law as divided on private and public law. This division in the minds of lawyers is naturally of importance when applying the law – there is a stress on grammatical interpretation in the area of public law, and it is understood that the freedom of will of parties is limited to a greater extent. This texts aims to oppose to this traditional division and point out the fact that the division lacks sense within the unified European system and may lead to incorrect interpretation and application. European legal rules regulating international insolvency proceedings are above all the European community rules and thus the EC interpretation rules, as defined by the European Court of Justice and the doctrine, are to be applied primarily.

Key words

Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings – insolvency law – bankruptcy – private law – public law – international private law – international procedure law – EC-Law

Introductory Notes

A collocation „European international insolvency (bankruptcy) law" may give rise to a variety of connotations. Under the traditional rules of Czech doctrine, the following adjectives stand for a particular subset of legal rules:

a) the adjective „European" stands for a regulation by European Community law, European Union law, or European law in the larger sense;[1] this article uses the adjective European as being equal to the European community law,[2]
b) the adjective „international" stands for a regulation of cross-border relations, i. e. cases related to more than one legal system involving a foreign element,[3]
c) the adjective „insolvency" stands for legal rules regulating the legal relations arising from insolvency.

Despite the above mentioned clarification, there remain several questions unanswered that correspond to the central European social and legal thinking. What exactly is a legal relation arising from insolvency? What is the nature of its regulation within a legal system? Is it a public law or private law relation? What is the criterion for its internationality? If the European community law regulates such relations, does it exclude the regulation by national legal rules? This article does not aim to find answers to all of these questions. Rather, it seeks to create a starting position for finding the answers. It will therefore try to classify the European international insolvency law within a legal system and to deal with this particular segment of legal system from the point of view of the traditional continental dichotomy that divides law into public and private.

Insolvency Law and its Relation to Other Legal Areas

Given the fact that European international insolvency law regulates cross-border relations in the case of insolvency, (i. e. property and assets related relations) and that it regulates

[1] This approach involves the legal rules created in Europe within the international law into the framework of the European law. E. g. treaties concluded within the Council of Europe can be considered a part of this „European" law.

[2] Particular details of the respective legal terminology cannot be discussed in this article due to its complexity. For more informations on this issue see *Týč, V.*: Základy práva EU pro ekonomy. 5th edition. Praha: Linde, 2006. P. X.

[3] In the sense as defined in *Kučera, Z.*: Mezinárodní právo soukromé. 6th edition. Brno: Doplněk, 2004. P. 17.

procedural aspects of such relations, a questions rises of what is its relation to the national insolvency law, international private law and international (civil) procedure law.

Insolvency proceeding is a procedure that typically seeks to secure the pari-passu distribution to creditors in cases where a legally specified act of bankruptcy of a debtor occurs. The purpose of such procedures is therefore to provide the creditors (and their private law interests) with specific protection. Related to these procedures however, is a variety of other relations which cannot be simply classified as procedural since they are substantive in their nature.[4] This issue makes the relation between the insolvency law and traditional civil procedure law problematic.[5] Traditionally, the procedure law did not constitute an independent area of law. Historical evolution then made it possible for the procedure law to be set apart as an independent branch of law, since it defined the procedure law relations to be superior to the substantial law relations. The underlying reason behind this development was a need to secure a workable protection of the private substantial rights. Therefore, the nature of civil procedure relations is typically authoritative[6] and it is inherently tied to the public law method of regulating the legal relations. The state guarantees this protection and regulates the legal standing of the subjects of substantial law relations in a unilateral way. That is also the reason why the civil procedure law is classified with the public law branch of legal discipline.[7] It is not possible, however, to use the above mentioned premises for those rules of insolvency law which are not the procedural ones. This gives rise to a question of whether the insolvency law constitutes a part of the civil procedure law system and whether it belongs into the public or private law branch of legal discipline.

Private international law as a branch of legal discipline is considered a civil law branch[8] and comprises a body of norms which govern private law relations involving a foreign element.[9]

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[4] Insolvency (opening of an insolvency proceedings) across the legal orders brings about a variety of effects in substantial law – it is a reason for end of substantial legal relations, it often influences the statute of frauds, the insolvency trustee is authorized by law to act in the name/on behalf of the debtor, etc.

[5] Sometimes, some types of insolvency proceedings are considered universal executions; see, e. g. *Hora, V.*: Československé civilní právo procesní. Díl I. Nauka o organisaci a příslušnosti soudů. 3rd edition. Praha: Všehrd, 1931. P. 9.

[6] Similarly, see *Macur, J.*: Občanské právo procesní v systému práva. 1st edition. Brno: Universita J. E. Purkyně v Brně, 1975. P. 236 et seq.

[7] Compare *Zoulík Fr.* in *Winterová, A. et al.*: Civilní právo procesní. 2nd edition. Praha: Linde, 2002. P. 48.

[8] For more details see *Kalenský, P.*: K předmětu a povaze mezinárodního práva soukromého a k otázce jeho místa v systému práva. Časopis pro mezinárodní právo 1960, p. 81 et seq.; *Kučera, Z.*, cited work, p. 31 to 33; *Kanda, A.*: Charakteristika a tendence právní úpravy mezinárodního obchodního styku (k některým teoretickým problémům občanskoprávních vztahů s mezinárodním prvkem). Studie z mezinárodního práva. Svazek 20, 1986, p. 181 et seq.

International procedure law is a set of rules that governs the action of courts and other authorities, parties or other persons, and the relations among them arising in the private law matters that involve a foreign element.[10, 11] *Kučera* – using a variety of crucial arguments[12] – classifies the international procedure law within the scope of the international private law. According to *Týč*, on the other hand, the international civil procedure law does not constitute a comprehensive system and therefore, as opposed to the international private law, it cannot be considered an independent branch of Czech legal discipline.[13] He supports this conclusion by arguing that international civil procedure law regulates only specific issues, which cannot be regulated under the general rules.[14] From this point of view, international civil procedure law can be considered a part of civil procedure law.

Assuming the European international insolvency law governs both the procedural and substantive (or, if you like, the material or the merits of) legal relations, and such relations inherently involve a foreign element, it is then of course possible to class the European international insolvency law with:

1. either the international private law system (including the international procedure law), and think of it as of a private law,
2. or the civil procedure law system (of which the international procedure law represents a special part) and think of it as of a public law.

Private or Public Law?

The distinction between private and public law features the typical classification that the civil law system is based on. It originates in the traditional „interests theory" that has its roots in

[9] *Kučera, Z.*, cited work, p. 21.
[10] *Kučera, Z.*, cited work, p. 376.
[11] Compare also *Steiner, V. – Šrajgr, Fr.*: Československé mezinárodní civilní právo procesní. Praha: Academia, 1967. P. 10.
[12] *Kučera, Z.*, cited work, p. 377.
[13] *Týč* in *Rozehnalová, N. – Týč, V. – Záleský, R.*: Vybrané problémy mezinárodního práva soukromého v justiční praxi. 2nd edition. Brno: Masarykova univerzita, 2002. P. 53.
[14] *Týč*, sub detto. About particularity of (European) international procedure law see more e. g. *Stavinohová, J. – Hurdík, J. – Lavický, P.*: Evropské podněty českému civilnímu procesu. In: *Hurdík, J. – Fiala, J. (eds.)*: Východiska a trendy vývoje českého práva po vstupu České republiky do Evropské unie. Brno: Masarykova univerzita, 2005. P. 265.

the ancient Rome legal maxim of *Ulpianus* stating that *publicum ius est quod ad statum rei romanae spectat privatum quod ad singulorum utilitatem.*[15] The above mentioned method of legal regulation (or, the issue of the subjects´ autonomy level within a legal relation) has become a respected criterion of the Czech legal doctrine used in order to differentiate between the private and public law.[16] Almost every branch of the private law needs to reconcile the fact that a part of its rules is of a specific nature which inherently involves the authoritative actions of the State. By these actions the State interferes with the position of the private law individuals that would otherwise be equal. Some of the civil law areas, such as the family law or labour law, then tend to be classified as mixed branches. It is so because the level of public law regulation in those areas is of such significance that it notably shifts those areas' legal regulations on a scale from the private one to a public one. However, it is impossible to find an exact division between where the „private law rules" end and the „public law ones" begin. This situation has been in fact recognized by the Czech Constitutional Court too. The Court held that „it starts from the fact that in these days the private and public law are not separated by the ‚great wall of China'. Public and private law elements blend together more often and in a closer way. The fundamental feature of the private law is the equality of its subjects, which corresponds to the freedom of contract principle and the preference for non-mandatory rules. The equal standing of the parties entails above all the absence of relation of superiority and subordination, i. e. no party in the relation is in principle entitled to a unilateral imposition of a duty onto the other party. The equal standing of the parties' principle in private law relations however does not exclude the possibility for the State to intervene."[17]

This article does not want to criticize the legal dichotomy as lacking any reason. It is nevertheless necessary to accept the fact that the division between those two areas is blurred. To cite a related example, one can focus on the definition of civil law relations as given by the section 1 par. 2 of the Czech Civil Code. The criteria established by this section require a relation to be a „proprietary relation" in order is classified as a civil law relation rather than the fact that such relation is governed by the civil law statutes.[18]

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[15] *Ulpianus*, Digesta 1.1.1.2.
[16] For more details see *Hurdík, J.*: Úvod do soukromého práva. 1. vydání. Brno: Masarykova univerzita: 1998. Esp. p. 21 and 22.
[17] See Decision of Constitutional Court from 23rd February 2001 in Sbírka nálezů a usnesení Ústavního soudu. Svazek 21. 1st edition. Praha: C. H. Beck, 2002. Decision No. 5, p. 29 et seq.
[18] Proprietary relations are often regulated by the public law rules, e. g. zákon o majetku České republiky, zákon o obcích, zákon o ochraně přírody a krajiny etc.

The distinction between the public and private law is an undeniable tradition but it is important to point out that some of the other legal systems, such as Islamic law, are not familiar with this division at all. Other legal systems, e. g. the Anglo – American one, are acquainted with a dualism of law, yet a totally different one, consisting of the common law and equity. In English law the term public law is understood as designation for constitutional and administrative law.[19] It is not without importance to note that several initiatives, which aim to loosen the regulation of insolvency at a global scale and to support the creation of non-mandatory insolvency rules at a greater level, originate especially in the common law countries.[20]

Taking into account the fact that the backbone of the European international insolvency law is represented by the Council regulation (EC) No 1346/2000 on „Bankruptcy Proceeding"[21] (hereinafter, the European Insolvency Regulation), this document unifies the cross-border insolvency issues both across the legal orders and the systems of law. With respect to its global scope it does not seem appropriate to adhere to the private-public law division standard or point of view. This is true even more if we take into consideration the inconsistent approaches related to the private-public law division within the continental law system itself. Besides, the legal reality is also partially expressed by the Czech Constitutional Court opinion. The Court emphasized that the efforts to construe a clear private-public law distinction do not represent a suitable solution. It is a fully acceptable position. There is nothing to prevent the sovereign legislator from inserting authoritative rules or elements into the areas of law that are considered private by a continental lawyer. This action consequently limits the parties and their exercise of the freedom of will in their proprietary relations.

[19] See also *Knapp, V.*: Velké právní systémy. Úvod do srovnávací právní vědy. 1. vydání. Praha: C. H. Beck, 1996. P. 70 et seq.

[20] See *Diamantis M. E.*: Arbitral Contractualism in Transnational Bankrupcty. Southwestern University Law Review, 2006, p. 334 et seq.; *Eidenmüller, H.*: Free Choice in International Company Insolvency Law in Europe. European Business Organization Law Review, 2005, p. 423 et seq.

[21] It is a literal English translation of Czech words „nařízení o … úpadkovém řízení". The translation of the regulation's title into Czech however does not fully correspond to its title in English [*Council regulation (EC) No 1346/2000 on insolvency proceedings*], or in other languages; see *Kapitán, Z.*: Principy evropského insolvenčního práva a jejich promítnutí v připravované rekodifikaci českého insolvenčního práva. In: *Hurdík, J. – Fiala, J. (eds.)*: Východiska a trendy vývoje českého práva po vstupu České republiky do Evropské unie. Brno: Masarykova univerzita, 2005. P. 247 et seq.

Conclusion

The conclusion related to the classification of the European international insolvency law within the system of law makes it possible to take a positivist point of view, i. e. a view based on the text of a legal regulation. The applicability of this solution is supported by the fact that a content and a structure of the rules is the same for all the member states of the European Union no matter if they are civil law or common law countries. European insolvency regulation uses three kinds of rules to regulate cross-border insolvency relations:

a) conflict-of-law rules (determining the legal order that will govern a particular legal issue in case where the insolvency regulation lacks expressed subject-matter regulation),
b) procedural rules (governing the procedure in international insolvency proceedings and related procedures),
c) direct rules (comprising unified subject-matter regulation, thus can be considered substantial legal rules).

The whole set of European Insolvency Regulation rules is, in its nature, peremptory to a large extent. Its nature is a consequence of an authoritative regulation which does not provide for the freedom of will of the subjects in the international insolvency proceedings. These rules also tend to be rather abstract, given the need to set forth unified rules for a considerable amount of diverse legal orders.

Considering the fact that this set of rules, given either its content or construction, does not deviate from the method of regulation and the way the rules of the international private law or international procedure law are construed, it is not possible to conclude that the European international insolvency law satisfies the criteria required in order to be considered an independent legal area.[22] European international insolvency law represents a body of legal rules which are special rules related to the cross-border insolvency relations. These special rules constitute a part of international private law

[22] For the criteria see also *Hurdík, J.*, cited sub 16, p. 40 and 41.

(choice-of-law rules and direct rules)[23] **and international procedure law (procedural rules), and they are gathered, singly or combined, in various legal documents.**[24]

European international insolvency law is, in the first place, a European community law. That is why it is subject to the interpretation criteria of the European community law[25] **no matter how the insolvency law is classified within the national legal order.**

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[23] Similarly see *Reinhart* in *Kirchhof, H.-P. – Lwowski, H.-J. – Stürner, R. et al.*: Insolvenzordnung. Münchener Kommentar. Band 3. §§ 270 – 335. Internationales Insolvenzrecht. Insolvenzsteuerrecht. München: C. H. Beck, 2003. P. 686 et seq.

[24] Especially in the European insolvency regulation and/or in several EC directives regulating international insolvency law.

[25] For more details see: *Tichý, L. – Arnold, R. – Svoboda, P. – Zemánek, J. – Král, R. et al.*: Evropské právo. 3rd edition. Praha: C. H. Beck, 2006. P. 227 et seq.