SOUDNÍ SPOLUPRÁCE V PŘESHRANIČNÍCH INSOLVENČNÍCH ŘÍZENÍCH

JUDICIAL COOPERATION IN CROSS-BORDER INSOLVENCY CASES

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Abstrakt

Autorka se věnuje nejnovějšímu vývoji v oblasti soudní spolupráce ES v přeshraničních insolvenčních řízeních. Vzhledem k tomu, že nařízení 1346/2000 neupravuje dostatečně podrobně principy spolupráce, komunikace a koordinace insolvenčních řízení, příspěvek je zaměřen na nejnovější iniciativu, Principy INSOL Europe, zejména pak část věnovanou spolupráci a komunikaci mezi soudy.

Klíčová slova

Soudní spolupráce, přeshraniční insolvence, nařízení 1346/2000, protokoly, komunikace mezi soudy, Evropské principy komunikace a spolupráce v přeshraničních insolvenčních řízeních, CoCo Principy.

Abstract

The author deals with the latest developments related to the judicial cooperation in the European Community cross-border insolvency proceedings. Given the fact that the Regulation 1346/2000 does not provide sufficient guidance on cooperation, communication and coordination of the proceedings, the text focuses on recently emerged Guidelines of INSOL Europe, in particular on the provisions regarding the court – to – court communication and cooperation.

Key words

Judicial cooperation, cross-border insolvency, Regulation 1346/2000, protocols, court-to-court communication, European Communication and Cooperation Guidelines For Cross-Border Insolvency, CoCo Guidelines.

Being one of the underlying aims of the EC Treaty, the proper functioning of the internal market principle moves the EU law making ahead. Cross-border movement of assets and creditors has been growing and thus bringing new risks. Insolvency of the Community law undertakings affects and endangers the proper functioning of the internal market. It has been more than 40 years since the first unification attempts in the field of international insolvency law of the European Community (EC) began. The original „Europe of six" consists nowadays of twenty-seven member states, including the Czech Republic. Five years ago the Council Regulation (EC) No. 1346/2000 on Insolvency Proceedings came into force in the European Community.[1] Since 2002 there have been some 200 published member states court cases related to the application of the European Insolvency Regulation (hereinafter, the EIR)[2] and two important judgments of the Court of Justice of the European Communities (hereinafter, the ECJ).[3] In the Czech Republic, however, there has been so far only limited discussion on this topic.[4]

The EIR aims for coordination of the measures to be taken regarding an insolvent debtor's assets. It establishes uniform private international law rules on international jurisdiction, applicable law, recognition of insolvency proceedings, and coordination of parallel

[1] The Regulation is not applicable in Denmark.

[2] Wessels, B.: *Guiding Coordination in Cross-Border Insolvency Proceedings in Europe*. International Insolvency Institute Conference, 2007, p. 2. Available at: http://www.bobwessels.nl/wordpress/ (hereinafter Wessels, B.: *Guiding*).

[3] C-1/04 Susanne Staubitz-Schreiber [2006] ECR I-00701, Eurofood IFSC Ltd., C-341/04. [2006] ECR I-03813. For the latest related decisions see C-73/06 Planzer Luxembourg Sàrl v Bundeszentralamt für Steuern from June 28, 2007 (unreported, available at http://eur-lex.europa.eu), or preliminary question by German Bundesgerichtshof from June 21, 2007 (IX ZR 39/06).

[4] See e. g. a study on international insolvency law by Tichý, L.: *Základní orientace mezinárodního konkurzního práva.* Praha: Univerzita Karlova, 1995. As for the debate in legal journals, see e. g. Kapitán, Z.: *Základní principy úpravy evropského insolvenčního práva a nařízení Rady (ES) č. 1346/2000, o úpadkových řízeních.* Právní forum, 2005, Issue 1, p. 369 et seq., Šabatka, P.: *Mezinárodní pravomoc podle nařízení o insolvenčních řízeních.* Právní rozhledy, 2006, Issue 3, p. 95 et seq., Adam, J.: *Evropské úpadkové právo*. Právní rozhledy, 2006, Issue 10, p. 366 et seq., Brodec, J.:, *Uznání zahraničního rozhodnutí o zahájení konkursního řízení v rámci EU a některé s tím spojené otázky dle českého právního řádu.* Právní rozhledy, 2006, Issue 12, p. 437 et seq. Case comments: Sobotková, K.: *Úpadkové řízení - zásada přednosti a vzájemné důvěry*. Jurisprudence, 2006, Issue 5, p. 66 et seq., Richter, T.: *Rozsudek ve věci Eurofood: středisko hlavních zájmů insolventní obchodní společnosti*. Jurisprudence, 2006, Issue 6, p. 40 et seq.

proceedings.[5] The EIR is based on a model of modified universality where the main insolvency proceedings with universal scope worldwide is supplemented by secondary (or territorial) proceeding with effect limited to the territory of a member state where it was commenced.[6] The connection between both proceedings is founded on the principle that the administration concerns one debtor with one estate and one group of creditors.[7]

Much has been written about the article 3 (International Jurisdiction) of the EIR and its interpretation. The arguments on international jurisdiction and the centre of main interests (COMI) often undermine the aims of the EIR. Several cases have become the very opposite of the EIR´s principle of mutual trust, cooperation and communication between liquidators and coordination of all the concurrent proceedings.[8] In Daisytek case[9] the secondary proceedings were open in France as a second front after the French court had lost the battle for the main proceeding status. According to one commentator, a judge of the French commercial court might have opened the Daisytek French main proceeding, despite he knew of the pending English main proceeding, because he was not a lawyer.[10] Similarly, the German local manager of Daisytek´s subsidiary misled the German court by not informing the court that she knew of the decision opening a main proceeding in England. Thus, she gave the court the impression that the English decision was made without her knowledge in violation of due process. The manager had subsequently admitted that she had consented to the English filing.[11] Another example of failed cooperation between the liquidators and the courts is the infamous Eurofood controversy.[12]

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[5] Virgós, M., Garcimartín, F.: *The European Insolvency Regulation: Law and Practice*. The Hague: Kluwer Law International, 2004, ISBN 90-411-2089-0, p. 7 – 8.
[6] See Art. 3 of the EIR.
[7] Wessels, B.: *Guiding*, op. cit. p. 3.
[8] Being the legal instrument established within the scope of judicial cooperation in civil matters within the meaning of Article 65 of the Treaty coordination, the EIR sets forth the provisions on communication and cooperation which are necessary to facilitate effective and efficient cross-border insolvency proceedings, see e. g. recitals 1 – 4, 8, 20, 22 of the EIR.
[9] Daisytek-ISA Ltd., (High Court of Justice) [2003] B.C.C. 562; Klempka (in his capacity as joint administrator of ISA Daisytek SAS) v. ISA Daisytek SAS, [2004] I.L.Pr. 6 C d'A (Cour d´Appel Versailles); French Republic v. Klempka (administrator of ISA Daisytek SAS), Court of Cassation Paris, [2006] B.C.C. 841 (Cass (F)).
[10] Bufford, S.L.: *International Insolvency Case Venue in the European Union: The Parmalat and Daisytek Controversies*, [2006] 12 Colum. J. Eur. L. 429, 460. For information on the French commercial courts system see Koral, R., L., Sordino, M.: *The New Bankruptcy Reorganization Law in France: Ten Years Later*, [1996] 70 Am. Bankr. L.J. 437, and Didier, I.: *The Changing Landscape in European Insolvency (The French View*), 2006, available at: www.grip21.org.
[11] Bufford, S.L.: *International Insolvency Case Venue in the European Union: The Parmalat and Daisytek Controversies*, [2006] 12 Colum. J. Eur. L. 429, 464., citing the decision of the German court: AG Düsseldorf from March 3rd, 2004, 501 IN 126/03.
[12] Eurofood IFSC Ltd., C-341/04. [2006] ECR I-03813.

Court – to – Court Communication and Cooperation

Lack of communication and cooperation often seems to be an underlying feature of the battles over the COMI. Article 31 of the EIR provides for duty of liquidators to cooperate and communicate information. Besides the general guideline, the article contains no further rules or sanctions in case of a breach of the duty set forth therein. The EIR does not elaborate on the ways in which this cooperation should function in practice. According to the Virgós-Schmit report,[13] where appropriate, the applicable national law will determine the liquidator´s liability when the latter has not respected the duties arising from Article 31.

Concrete provisions on judicial cooperation between the courts are not explicitly provided for in the EIR either. However, several member state courts interpreted the Article 31 on cooperation of liquidators as placing an obligation to cooperate also on the courts.[14] Garcimartín and Virgós find it reasonable for the cooperation principle to apply to the competent legal authorities, even though they act on a secondary level.[15] Lack of further guidance in the EIR has resulted in ad hoc communication and cooperation without a solid and practical framework.[16]

Recently, a group of legal academics, practitioners and judges led by M. Virgós and B. Wessels prepared European Communication and Cooperation Guidelines For Cross-Border Insolvency (aka CoCo Guidelines).[17] The document is intended to resolve practial problems related to judicial cooperation which are only vaguely or not at all regulated by the EIR.
Some of the Guidelines were inspired by the principles laid down in the CCBE (Council of Bars and Law Societies of Europe) – Charter of Core Principles of the European Legal

[13] This report was written in 1995 by Miguel Virgós a Etienne Schmit as a Council document 6500/1/96. It is an unofficial commentary to the Convention on Insolvency Proceedings. The Report serves nowadays as an interpretative quideline for the EIR. Available at http://aei.pitt.edu/952/.
[14] See e.g. Re Stojevic, Oberlandsgericht Wien (Unreported, November 17, 2004) and Oberster Gerichtshof (Unreported, March 17, 2005), Austria. For Comments see, Moss, G.: *Viennese Waltz for Two Main Proceedings: The Stojevic Saga*. Insolv. Int. 2005, 18(9), 141 – 143. Fletcher, I. F.: COMI at the Relevant Time. Insolv. Int. 2007, 20(4), 60 – 62.
[15] Virgós, M., Garcimartín, F.: *The European Insolvency Regulation: Law and Practice*. The Hague: Kluwer Law International, 2004, ISBN 90-411-2089-0, point 439.
[16] Wessels, B.: *Guidelines*, op. cit., p. 5.
[17] Adopted by INSOL Europe in October 2007. For more information see: Wessels, B., Virgós, M.: *Accommodating Cross-border Coordination: European Communication and Cooperation Guidelines For Cross-Border Insolvency*. International Corporate Rescue, Vol. 10, Issue 10, 2007. For comparison see American Law Institute's *Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases*, available at: www.iiiglobal.org/members/committee_c.html.

Profession (2006), the EBRD (European Bank for Reconstruction and Development) – Insolvency Office Holders Principles (Draft January 2007) and ALI/UNIDROIT (American Law Institute) Principles on Transnational Proceedings (2004).[18] Guidelines are set of eighteen non-binding principles and minimum standards of communication and cooperation for liquidators and courts in cross-border insolvency cases under the EIR.[19] Due to its nature the Guidelines do not intend:

(i) To interfere with the independent exercise of jurisdiction by each of the national courts involved, including their respective authority or supervision over a liquidator;

(ii) To interfere with national rules or ethical principles by which a liquidator is bound according to applicable national law and professional rules; or

(iii) To confer substantive rights or to interfere with any function or duty arising out of the EC Insolvency Regulation or to impinge on applicable national law.[20]

The Guidelines strongly recommend a usage of modern means of communication (telephone, email, fax or video conferences) and so called protocols.[21] Courts are encouraged to coordinate orders and rulings and conduct joint hearings, e.g. by conference call, with or without translators.[22]

To the maximum extent permissible under national law, courts conducting insolvency proceedings or dealing with requests for assistance or deciding on any matters relating to communications from other courts should cooperate with each other directly, through liquidators or through any person or body appointed to act at the direction of the courts (Guideline 16.4.).

However, any method of communication based on agreement between the parties may not interfere with applicable law.[23] Protocols are used especially in common law countries.[24]

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[18] Wessels, B., Virgós, M.: *Accommodating Cross-border Coordination: European Communication and Cooperation Guidelines For Cross-Border Insolvency*. International Corporate Rescue, Vol. 10, Issue 10, 2007, p. 2.

[19] Id., p. 2.

[20] Guideline 3.

[21] Wessels, B., Virgós, M.: *European Communication and Cooperation Guidelines For Cross-Border Insolvency*. May 2007 Draft, p. 17. Available at: http://www.bobwessels.nl/wordpress/. (hereinafter CoCo May 2007).

[22] CoCo May 2007, op. cit., p. 40.

[23] CoCo May 2007, op. cit., p. 24, e.g. rules provided by the Council Regulation (EC) No. 1348/2000 on the service in the Member States of judicial and extrajdicial documents in civil or commerical matters regarding the form and language of certain communications.

They have no prescribed format and address issues of a particular case, with possibility for amendment.[25] Usage of protocol outside the common law countries raises a question of legal or judicial culture and its diversity, question of whether a judge might have the power to recognize a protocol or suggest the use of such an agreement to the parties, and a question of appropriateness of direct communication between judges and the ability of judges to communicate directly. [26]

As long as the national law of each of the proceedings and the EIR rules are respected, the Article 31 does not per se exclude the possibility to use a protocol, either binding or non-binding one. Adopted protocol in fact specifies expressly the EIR`s generic duty to cooperate. An unjustified breach (or lack of an alternative) of those specific provisions in the protocol may then result in legal action for a breach of the duty to cooperate established in Article 31/2.[27] European version of a protocol filed in conformity with the EIR has been succesfully used in the case of a French branch of Sendo International Limited, concluded between French and English liquidators and approved by the commercial court in Nanterre in 2006.[28] The protocol coordinated the roles of liquidators in the main and secondary proceedings related to:

(a) information concerning creditors domiciled in the two countries;
(b) the exchange of lists of creditors and of assets;
(c) the transmission of proofs of claims in the two proceedings;
(d) legal costs in respect of the opening of proceedings;
(e) the coordinated treatment of assets and the payment of creditors admitted in the secondary proceedings.[29]

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[24] CoCo May 2007, op. cit., p. 18. Authors cite several protocols by US, UK and Canadian parties seeking cooperation with Switzerland, Bahamas, Israel and Hong Kong.
[25] *Facilitation of cooperation, direct communication and coordination in cross-border insolvency proceedings,* Note by the Secretariat, UNCITRAL, A/CN.9/629, 2007, point 5. Available at: www.uncitral.org.
[26] Id., points 6 and 14. For more information see: Paulus, Ch.: *Judicial Cooperation in Cross-Border Insolvencies. An Outline of Some Relevant Issues and Literature* 2006. http://siteresources.worldbank.org.
[27] Virgós, M., Garcimartín, F.: *The European Insolvency Regulation: Law and Practice.* The Hague: Kluwer Law International, 2004, ISBN 90-411-2089-0, point 441.
[28] Commercial Court of Nanterre, order dated 29 June 2006, Dalloz 2006, p. 2237.
[29] Toube, F.: *European Insolvency News, The Sendo Case.* Eurofenix, Winter 2007, p. 14. Available at: http://www.insol-europe.org/downloads/eurofenix/07_Winter_EN_Eurofenix.pdf.

Following the European CoCo Guidelines, a draft of a Model Protocol might be another iniciative endorsed by INSOL Europe.[30] Latest efforts of the UNCITRAL in the same area seem to suggest that this new trend will hopefully not remain limited to the European Community territory.[31] Face to face to the above mentioned challenges Czech insolvency law, unfortunately, remains silent. [32]

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[3] Bufford, S.L.: *International Insolvency Case Venue in the European Union: The Parmalat and Daisytek Controversies*, [2006] 12 Colum. J. Eur. L. 429, 460.

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[7] Koral, R., L., Sordino, M.: *The New Bankruptcy Reorganization Law in France: Ten Years Later*, [1996] 70 Am. Bankr. L.J. 437.

[8] Moss, G.: Viennese Waltz for Two Main Proceedings: The Stojevic Saga. Insolv. Int. 2005, 18(9), 141 – 143.

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[11] Sobotková, K.: *Úpadkové řízení - zásada přednosti a vzájemné důvěry.* Jurisprudence, 2006, Issue 5, p. 66 et seq.

[30] Van Nielen, W.: *Bucharest: The CoCo Guidelines versus Real - World Experience.* Eurofenix, Winter 2007, p. 12. Available at: http://www.insol-europe.org/downloads/eurofenix/07_Winter_EN_Eurofenix.pdf.

[31] See *Facilitation of cooperation, direct communication and coordination in cross-border insolvency proceedings,* Note by the Secretariat, UNCITRAL, A/CN.9/629, 2007.

[32] See Zákon č. 182/2006 Sb., o úpadku a způsobech jeho řešení (insolvenční zákon) and its scarce provisions §§ 426 – 430 related to the EIR. The Insolvency Act more over does not contain any provisions on cross-border insolvency proceedings relating to non – E C states.

[12] Šabatka, P.: *Mezinárodní pravomoc podle nařízení o insolvenčních řízeních.* Právní rozhledy, 2006, Issue 3, p. 95 et seq.

[13] Tichý, L.: *Základní orientace mezinárodního konkurzního práva.* Praha: Univerzita Karlova, 1995.

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[16] Virgós, M., Garcimartín, F.: *The European Insolvency Regulation: Law and Practice.* The Hague: Kluwer Law International, 2004, ISBN 90-411-2089-0, 256 p.

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[18] Van Nielen, W.: *Bucharest: The CoCo Guidelines versus Real - World Experience.* Eurofenix, Winter 2007. Available at: http://www.insol-europe.org/downloads/eurofenix/07_Winter_EN_Eurofenix.pdf.

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[22] C-1/04 Susanne Staubitz-Schreiber [2006] ECR I-00701.

[23] C-341/04 Eurofood IFSC Ltd. [2006] ECR I-03813.

[24] C-73/06 Planzer Luxembourg Sàrl v Bundeszentralamt für Steuern from June 28, 2007 (unreported, available at http://eur-lex.europa.eu).

[25] Preliminary question by German Bundesgerichtshof from June 21, 2007 (IX ZR 39/06)

[26] Daisytek-ISA Ltd., (High Court of Justice) [2003] B.C.C. 562.

[27] Klempka (in his capacity as joint administrator of ISA Daisytek SAS) v. ISA Daisytek SAS, [2004] I.L.Pr. 6 C d'A (Cour d´Appel Versailles).

[28] French Republic v. Klempka (administrator of ISA Daisytek SAS), Court of Cassation Paris, [2006] B.C.C. 841 (Cass (F)).

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