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Panel 4 – International bankruptcy law

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Preamble

Thank you very much Professor Baudenbacher for the introduction and for the flattering words. Dear colleagues, ladies and gentlemen, dear students, although icy temperatures prevail outside, I warmly welcome you to our fourth panel dealing with a judicial dialogue in international bankruptcy law, like it has been mentioned just before. We are very pleased that you expressed your interest in the topic and that you are joining our conference on this Friday afternoon. Indeed international bankruptcy law has become more and more important, especially nowadays in the light of a worldwide economic crisis, and it is becoming even more important, that a judicial dialogue, meaning the communication between courts in the field of international bankruptcy law, takes place; And the dialogue ought not only be held in international bankruptcy law, but of course also in international reorganisation law. This panel will deal with both fields of law on behalf of their importance and actuality.

First of all, I would like to introduce the three speakers of today's panel in the sequence in which they will hold their speeches after my introduction. First of all, I would like to introduce Professor Christoph Paulus sitting on my left-hand side. Professor Paulus is from the Humboldt University. He has studied in Munich and Berkley. He has been professor for civil law, procedural law, bankruptcy law and ancient legal history at the Humboldt University in Berlin since 1994 and he has been the dean of the mentioned University since 2008. Before that, he was an associate professor at the Universities of Augsburg, Berlin, Heidelberg and Saarbrücken and visited several universities including the University of Boconi. Furthermore he consulted the German government, the World Bank and the International Monetary Fund.

The second speaker of today's this panel is Mr. Professor Jay Westbrook sitting on my right-hand side. Professor Westbrook is from the University of Texas, Austin. Professor Jay Westbrook holds the Benno C. Schmidt chair of business law at the University of Texas, Austin, where he also studied law. He is the grand and great old man of American scholars in the field of bankruptcy law. He also teaches and writes on commercial law and international business litigation. He used to practice in Washington D.C. in a major law firm. Professor Jay Westbrook visited as professor the Harvard Law School and the University of London. Among many other functions, he consulted the International Monetary Fund and the World Bank.

Last but not least, I would like to introduce Mr. Adam Goodison. Mr. Goodison works as a barrister in London in the firm Gray's Inn. Adam Goodison studied at the Durnam University and visited the bar school in London. He was called to the bar in 1999 and was elected as a member of the bar council. Adam Goodison is specialized in bankruptcy and reorganisation law. He has gained a broad practice since he has been called to the bar and has been more or less very active in these fields of law. He has taken part at big restructuring cases, notably BCCI and TXU.

As you can see, we have got really well known - worldwide known - experts in today's panel and I am very glad and I am looking forward to interesting speeches and interesting discussions.

A. Introduction

I would like to give you an introduction on today's topic before we start with the main speeches. I would like to start off with a general short introduction on insolvency litigation in an international context. I would like to talk about why a dialogue between courts in international bankruptcy law is nowadays becoming increasingly important, which problems we face in this regard and how these problems can be addressed.

More than ever in the so-called period of globalisation companies develop economic activities worldwide. Their assets are not concentrated in only one country, but are spread all over the world. If it comes to a breakdown like the one we had experienced in the banking sector recently, the existing assets of bankrupt debtors must be liquidated in order to satisfy the creditors. The liquidation procedure should be adjusted to maximise the revenue for the creditors. In the case of international companies, the economic entities are legally located in different countries, (e.g. parent company in one country and subsidiary companies in other countries), the assets are not concentrated in only one country and the creditors live in different countries. It is obvious that transaction costs on one hand and procedural costs on the other hand are higher compared to national bankruptcy cases. Normally there are several procedures in different countries and not just the one. In the end creditors of an international acting debtor get less, as a general rule, than creditors of a small local debtor in case of a bankruptcy. Usually an international debtor is bigger and its insolvency causes more damages to its creditors. That makes efficient procedures in international insolvency cases particularly important. Efficient procedures in reorganisation cases are even more important: Successful reorganisation presupposes a quick acting and an effective cooperation of the different players, especially of the courts as well as of the debtor's management, the trustees appointed by the courts and also by the lawyers involved.

Herein after I will focus on issues of international bankruptcy cases, but these issues also or even more apply to reorganisation cases.

B. Approach

In what follows, I will focus on the cooperation between courts in different sovereign nations. In my opinion, such cooperation is the most important approach in order to make procedures in insolvency cases more efficient, because in the end, courts are the institutions which have to deal with bankruptcy cases and which have to make important decisions.

In the past, courts applied to the "first-to-judgment rule" or the "anti-suit injunction" in order to determine the optimal forum for multinational cases. A modern approach is judicial negotiation (interaction between courts). I will discuss this approach in conjunction with insolvency proceedings.

C. Categories of international insolvency cases

Before I elaborate on this, let me make some remarks regarding international insolvency cases in general:

If lawsuits involve many of the same parties as well as many of the same claims and are pending in courts of two or more sovereign nations, we have a situation of so-called "parallel litigation". In insolvency cases we can distinguish subcategories of "parallel litigation", namely "parallel proceedings" and "parallel claims" cases.

"Parallel proceedings" are situations, in which courts in two different countries have to deal, separately and independent from each other, with a complete insolvency proceeding related to the same debtor (e.g. parent and subsidiary).

In "parallel claims" cases only one insolvency is pending and a local court would dismiss or stay a claim against the insolvent debtor in favour of the foreign insolvency court that was charged with resolving all such claims.

In my opinion judicial negotiation is an approach to deal with cases of both categories in a pragmatic way. Nevertheless, it might be more important for parallel proceedings. That's why judicial negotiation seems to be more developed in such cases.

Herein after I will commence with more rudimental forms of judicial negotiation explaining "parallel claims" cases, and are going to finish off with more progressive forms by explaining "parallel proceedings". I will give some examples for both categories by summarizing court decisions taken mainly in the United States of America and in England, for - as you will see at the end of my speech - Switzerland has no considerable precedents in this field of law. The examples mentioned by me are discussed more detailed in an article of Professor Jay Westbrook, member of our today's panel, in the Texas International Law Journal. I will keep my remarks short, but in case of any interest, the article in the Texas International Law Journal can be consulted.

D. "Parallel claims" cases

In "parallel claims" cases, non-insolvency courts have to decide whether they dismiss or stay a claim they are confronted with, assuming the foreign insolvency court will act properly and fairly, or whether they proceed. It is obvious that such a situation needs cooperation. From my point of view, the conditional dismissal or stay as a possible approach in such situations can be considered as a first step to cooperation between courts. In the *Blanco* litigation for example, a company from Venezuela filed a lawsuit against a Venezuelan development bank in New York. The plaintiff company went bankrupt in Venezuela and trustees were appointed to control the company. The control was taken from the shareholders. The trustees sought dismissal of the New York suit. The shareholders however did not support this decision and intervened in the New York action, arguing they could not get justice in the Venezuelan courts and the trustees being hostile and unfair to them. The suit was dismissed (from the second court) under the condition that the Venezuelan bankruptcy court appoints a new co-trustee acceptable to the shareholders, otherwise the suit could be reopened in the U.S. In this case it is interesting that the U.S. court somehow intervened in the foreign court proceeding

(namely in the Venezuelan insolvency proceeding), taking all aspects of the case into consideration. This example shows how a court can determine the decision of the court of another country.

E. "Parallel proceedings"

In "parallel proceedings" courts used to follow the "grab rule": They sold the entire debtor's property within their territorial sovereignty under local law. Unfortunately, they did not think about the other courts involved. It is obvious therefore that this procedure used to cause losses for the creditors. Nowadays courts started to use alternative procedures:

In the case *In re Inverworld* the debtor defrauded hundred millions of Dollars from the investors. Cases against the parent company and subsidiaries were pending in Texas (U.S.), the Cayman Islands and England. In Texas, because the main office was there, in the Cayman Islands and England because transactions had been processed through subsidiaries located there. In addition, the contracts with investors as well as the contracts between companies had different and conflicting choice of law and choice of forum clauses. In order to avoid extremely expensive litigation in three national courts, and in order to avoid conflicting decisions, the representatives of the parties created protocols which were accepted by every court involved. The English insolvency proceeding was dismissed under conditions (conditions regarding the treatment of claimants therein and allocation of functions among the two remaining courts) while the remaining courts established a division of competences (the U.S. court was to resolve the outstanding legal and factual issues relating to entitlements as among various classes of investors, while the Cayman Islands court was to oversee the administration of the distribution of proceeds to claimants). To counter parallel litigation, each court had to respect the other court's action as binding. In the end a worldwide settlement was reached, which saved a lot of money.

In the famous case *In re Maxwell Communication Cooperation* (1994 – 1996) similar protocols led to a good solution. In this case there were two parallel proceedings, a Chapter 11 reorganisation proceeding under the U.S. Bankruptcy Code in the U.S. and an administration case and reorganisation proceeding in London. As it was a multinational reorganisation case, there were an operating protocol at the beginning and a distribution agreement at the end of the case. A special examiner, appointed by the U.S. court, created an operating protocol together with the London administrators to establish a cooperative administration. Later on a combined plan in order to distribute the debtor's assets was approved by the two courts. It was the first successful distribution plan adopted on a worldwide basis.

F. Direct communication

Also the UNCITRAL Model Law on Cross-Border Insolvency stipulates direct communication between courts. We will hear about this later on. There are certainly a lot of questions around direct communication, which have not been solved yet, namely how courts should communicate. From a technological point of view there are a lot of possibilities. In U.S. - Canadian insolvency cases, the courts even used joint video and telephonic hearings. There are also other difficulties, such as the language used for communication.

G. Conclusion

The few examples just mentioned show that there is international cooperation between courts in the field of insolvency law. Although no procedural questions have been answered yet, the existence of cooperating courts and of direct communication between courts and the acceptance of these circumstances as a principle is an important step towards more efficient results in international insolvency cases.

H. Situation in Switzerland

To finish off with, let us shortly look at the situation in Switzerland. Unfortunately, Switzerland has no considerable legal basis for judicial negotiation in insolvency cases. We have not adopted the UNCITRAL Model law on Cross-Border Insolvency, and as non-members of the European Union the European Ordinance Nr. 1346/2000 of May 29 2000 unifying the international bankruptcy law between the member states does not apply. Swiss courts rarely cooperate with foreign courts because they fear that even giving information to foreign authorities without sufficient legal basis could be considered as an official secret injury punished by law. Therefore as an important first step, Swiss law must be changed in order to provide for judicial negotiation in insolvency cases.

The Swiss Supreme Court had to decide the following case in the insolvency and reorganisation procedure of the national Swiss airline "Swissair" recently: At the time the insolvency (reorganisation) procedure of "Swissair" was pending in Switzerland. Lawsuits of the two Belgian creditors (namely of the national airline "Sabena" and of the Belgian State) against "Swissair" were pending at courts in Belgium for breach of contract. These creditors also filed their claims in the Swiss insolvency procedure. When the insolvency administrators in Switzerland and the Swiss courts had to decide over the acceptance of the claims of the creditors filed in the Swiss insolvency procedure, the two Belgian creditors applied for a stay of the decision in Switzerland until the lawsuits were decided by the Belgian courts. The Swiss Supreme Court, however, ruled that such a stay does not apply and that the stay would only be granted if the lawsuits were pending in Switzerland in front of Swiss courts. There was no proper cooperation. The Swiss insolvency administrators refused recognition of the claims of the Belgian creditors in the Swiss insolvency procedure and as a consequence these creditors were forced to cease appeal against the decision of the Swiss insolvency administrators and thereby to file new - and expensive - actions against the estate of Swissair in Switzerland.

Unfortunately cooperation between Swiss and foreign courts is at the very beginning. An exception to this exists with regard to banks, which are under the supervision of the Swiss Financial Market Supervisory Authority (FINMA). The FINMA has broad powers to intervene if banks are facing insolvency or already are insolvent. In such cases the FINMA is empowered to cooperate to a large extent with foreign courts. But with regard to other debtors there are neither precedents nor legal foundations for such an approach. I am glad to welcome our colleagues from abroad here in St. Gallen and I am happy to have the opportunity of considering their inputs. I think this dialogue is a first step to a creation of a more pragmatic law in Switzerland. At least there is cooperation even in Switzerland. And in the light of the given legal situation it is also very important for foreign debtors as well as for foreign

creditors, judges and lawyers to deal with lawyers in Switzerland, who are flexible and creative. Thank you very much ladies and gentlemen for your attention. Now I would like to give the word to Professor Paulus.