К проблеме отсутствия правового регулирования трансграничных банкротств в БРИКС: актуальность, вопросы и решения

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To the Problem of Lack of Legal Regulation of Cross-Border Bankruptcy in BRICS: Relevance, Issues and Solutions

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Аннотация

В статье рассматривается проблема отсутствия механизма правового регулирования трансграничных банкротств в рамках БРИКС. Приводятся статистические данные, демонстрирующие динамику расширения сотрудничества и роста объемов международной торговли между странами – участниками БРИКС, а следовательно, и необходимость принятие ряда соглашений, регулирующих экономические отношения между государствами, в том числе механизмов сотрудничества при трансграничных банкротствах. В статье речь идет о методах реализации трансграничных банкротств и обосновывается целесообразность применения метода модифицированного универсализма в рамках БРИКС. Вносятся предложения о принятии и ратификации ряда соглашений, регламентирующих правила определения места возбуждения дела о банкротстве и ведения основного производства, полномочия как основного судебного органа, так и вторичных, установление основ взаимодействия между судами.

Ключевые слова: страны БРИКС, международная торговля, трансграничная несостоятельность, трансграничное банкротство, международное сотрудничество, правовое регулирование, метод параллельных производств, метод универсального производства, метод модифицированного универсализма.

Abstract

The problem of the lack of a mechanism for the legal regulation of cross-border bankruptcies within the BRICS is discussed in the article. Statistical data are presented showing the dynamics of expanding cooperation and the growth of international trade between the BRICS countries, and, consequently, the need to adopt a number of agreements regulating economic relations between states, including cooperation mechanisms in cross-border bankruptcies. In the article the methods of implementation of cross-border bankruptcies are described and the expediency of using the modified universalism method within the BRICS is justified. Proposals are made for the adoption and ratification of a number of agreements regulating the rules for determining the place of initiation of bankruptcy proceedings and conducting the main proceedings, the powers of both the main judicial body and the secondary ones, and the establishment of the basis for interaction between the courts.

Keywords: BRICS, international trade, cross-border insolvency, cross-border bankruptcy, international cooperation, legal regulation, parallel production method, universal production method, modified universalism method.

BRICS members are characterized as the most rapidly developing large countries. Favorable position is ensured by the availability of both a powerful and developing economy and a large number of resources important for the world economy: territories, natural resources, labor, etc. These countries occupy more than 25% of the world's land and their territory is inhabited by more than 40% of the population planet.

There is no doubt that the main trend of the modern economy is globalization. Currently, the development of economic relations and international integration contributes to the widespread expansion of international trade, the emergence of a large number of transnational corporations on the national markets of states. The BRICS countries did not become an exception. The statement about the expansion of cooperation and the growth of the volumes of international trade between the countries of this group should be confirmed with statistical data.

Therefore, according to The Atlas of Economic Complexity Mapping Paths to Prosperity in 2012, 8,54% of all goods exported by Russia were sold to the BRICS countries and 16,81% of all imported goods were bought in the BRICS countries. China's indicators are much smaller – 6,91% of exports and 8,21% of imports. India exported to the BRICS countries 11,81%, while imports amounted to 16,14%. The percentage of Brazil's participation in trade relations within the BRICS is one of the highest and contributes 20,60% of exports and 18,82% of imports. South Africa holds the first place, 20,91% accounted for the exports of goods of the BRICS country and slightly less than the import figures – 19,21%.

For comparison, we give the data of the Atlas of Economic Complexity Mapping Paths to Prosperity for 2016. Indicators of Russian exports to the BRICS countries increased by 46,5% and contributed 12,5%, and imports by 42,5% and contributed to 23,99%. The level of China's participation remains low, exports to the BRICS countries were 10,92%, and imports 8,49%, which is 58% and 3,4% higher, respectively. Exports of Indian goods to the BRICS countries decreased and contributed to 6,41%, while imports increased by 35,7% to 21,9%. The growth in exports of goods from Brazil contributed 0,82%, according to 2016, 20,77% of Brazilian goods were sold in the BRICS countries. The import figures increased by 9,2% and were at the level of 20,55%. South Africa's exports to the BRICS countries fell by 24,95% and in 2016 contributed 15,46%, while imports increased by 27,25% to 24,45%.

The expansion of cooperation and the growth of international trade between the BRICS countries makes us think about the development of legal institutions. To further expand cooperation and increase trade volumes, it is necessary to adopt a number of agreements regulating economic relations between states. These agreements should be aimed at protecting the interests of both states and business, to promote harmonization of the legislation of the BRICS countries.

The need for interaction in the field of legal regulation within the BRICS was noted by Zhang Yuejiao, Director of the Academic Committee of the Study of the Law of the WTO of the Chinese

Legal Community, and Amardjit Sinh Chandiok, Vice President of the Indian Bar Association, at the IV BRICS Legal Forum.

In our opinion, one of the key areas of activity on legal integration is the creation of mechanisms for cooperation in cross-border bankruptcies. Taking into account the slowdown in the economic growth of some of the five member states and the growth of crisis expectations in the global economy, the development of a unified approach to regulating the procedure for cross-border bankruptcy is extremely urgent. It should be noted that the bankruptcy of one or several large corporations often entails a series of bankruptcies of their counterparties and causing significant material damage to states.

There are several approaches to understanding cross-border insolvency. Thus, cross-border insolvency can be understood as a case of bankruptcy of a transnational corporation. But, in our opinion, this approach should be considered only as a special case of cross-border insolvency, since the subject of the legal relationships under consideration can also be individuals who have assets and creditors in different jurisdictions.

Under the following approach, cross-border insolvency is equated with cross-border proceedings in the case. In our opinion, this is not entirely justified, since in some cases the initiation of proceedings is not necessary, and the recognition of a judicial act of another jurisdiction will be sufficient.

The most substantiated in our opinion is the approach, considered in detail by D. Deutsch and A. Hammer. They argue that cross-border insolvency is a bankruptcy procedure complicated by a foreign element that can be represented by the debtor, creditors or assets of the debtor. This approach is consistent with the definition of cross-border bankruptcy enshrined in the UNCITRAL Model Law on Cross-Border Insolvency of May 30, 1997. Thus, the cross-border insolvency "is the situation when an insolvent debtor has assets in several states or, when some of the creditors of the debtor are not in the state in which the insolvency proceedings are conducted." In our opinion, in the framework of the approach of D. Deutsch and A. Hammer most fully and accurately reveals the essence of cross-border insolvency.

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In the world community, attempts were repeatedly made to settle relations on cross-border bankruptcies with the help of international agreements or the adoption of model laws, however, these attempts did not bring much success. The most successful ones are the current EU Regulation "On insolvency procedures" N 1346/2000 and the UNCITRAL Model Law on Cross-Border Insolvency, which we have already mentioned. Despite the recommendatory nature of the Model Law, more than 40 states have now enacted legislation based on the UNCITRAL Model Law, but even this fact does not indicate the effectiveness and wide dissemination of international acts in the field of regulation of cross-border bankruptcies.

It is also worth noting the Istanbul Convention on Certain International Aspects of Bankruptcy, which has not yet entered into force. Despite this, the convention has a high theoretical value, it regulates the mutual recognition of the powers of the bankruptcy administrator, the conduct of parallel proceedings in the contracting states and jurisdictional criteria for the commencement of bankruptcy proceedings. Some scientists recognize this convention as the most significant achievement of universal unification in cross-border bankruptcy.

Certainly, when developing methods for regulating cross-border bankruptcy within the BRICS, previous experience in regulating this problem should be studied, but one should not

forget about the desire of the BRICS countries to retain their sovereignty and the development of the association itself as an international "quasi-organization" or "informal club".

At present, science has developed two main models of conducting proceedings in cases of cross-border bankruptcy – the conduct of a single production and the conduct of parallel production. In connection with the lack of a uniform international legal regulation of cross-border bankruptcy, the most common is the maintenance of a multitude of bankruptcy proceedings against one debtor. Due to the inconsistency of the actions of the national judicial authorities and the competition of parallel proceedings in cases, this method has several drawbacks: firstly, only the debtor's property located in the country where the proceedings were instituted is included in the bankruptcy estate; secondly, the inequality of domestic and foreign creditors arises , and thirdly, the costs of creditors for litigation significantly increase. In addition, it should be noted that the lack of coordination in the activities of the judiciary of various states makes it impossible for the debtor to recover financially.

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The revealed weaknesses of the method of parallel production point to the inadvisability of its application within the BRICS in connection with the negative impact on both the financial condition of the creditors and the debtor and on the interests of the member states of the group.

In order to minimize the costs of the bankruptcy procedure, the fair satisfaction of the claims of all creditors, regardless of the place of their registration and the location of the debtor's property, observance of the interests of states, a universal production method was developed.

The method of universal (main) production presupposes the initiation and consideration of the bankruptcy case in one definite place. This method is the basis of a number of international treaties and acts of a recommendatory character on cross-border insolvency, its application is of great practical value, since in the implementation of the universal production method court expenses are minimized, all the debtor's property is included in the bankruptcy estate, which maximizes the satisfaction of creditors' claims and minimizes the financial harm from bankruptcy. However, in the implementation of the universal production method, problems arise with the definition of the applicable law and the location of the proceedings in the case. Thus, the initiation of proceedings in a case can be made at the place of registration of the debtor, in the place of conducting the main business or in the state where the first application for bankruptcy was filed. The resolution of these contradictions is of fundamental importance for the regulation of cross-border bankruptcy, since the choice of the judicial authority and the applicable law largely determines the results of conducting cross-border bankruptcy. It should be noted that these contradictions are often a stumbling block for the implementation of international agreements on the regulation of cross-border insolvency.

In connection with the difficulty of implementing the method of universal production, the researchers proposed another approach to regulating the problem – "the method of unified universalism". This method involves, together with the main production in the case, the opening of secondary production in the states where the debtor's assets are located. Implementation of this method is also impossible without active international cooperation; however, this method is most preferable for implementation within the BRICS.

The application of the modified universalism method requires from BRICS member countries the adoption and ratification of a number of

agreements regulating the rules for determining the place of initiation of a bankruptcy case and conducting the main proceedings, the powers of both the main judicial body and secondary ones to establish the basis for interaction between the courts. It is also expedient to adopt the International Model Law of BRICS "On Cross-Border Bankruptcy" with a view to harmonizing the approach to bankruptcy proceedings. Particular attention should be paid to the procedures for financial recovery, since the priority for cross-border bankruptcy should be full satisfaction of creditors' claims, preservation of the debtor organization and trade ties.

It is expedient to determine the place of the main proceedings in the case at the place of registration of the debtor, subject to the availability of financial recovery and at the location of the principal assets of the debtor, in the absence of the possibility of financial recovery. At the same time, the judicial authorities conducting secondary production should be given broad powers to ensure the safety of the debtor's property.

In conclusion, it should be noted that the process of BRICS self-determination has not yet been completed. Further prospects for the development of trade relations within the group will depend on the willingness of the participating countries to cooperate in the field of legal regulation. A significant place in the BRICS legal system should be taken by the institution of cross-border bankruptcies, which will help minimize the costs of bankruptcy proceedings, fairly meet the claims of all creditors regardless of their place of registration and the location of the debtor's property, and, most importantly, is to observe the interests of not only the individual member countries, but also the BRICS as a whole.

References

1. *Abashidze A. H*., *Solntsev A. M*. BRICS – an International Quasi-Organization? // Actualization of the Process of Interaction of the BRICS Countries in the Economy, Politics, Law : Materials of the Scientific Seminar. October 9, 2012 / K. M. Belikova. – M. : Senate Press, 2012. – P. 9–15.

2. *Afonin V. Ye*., *Kovyazin V. V*., *Kondrat E. N*., *Murmuridis P. Ye*. On the Mechanisms of International Legal Cooperation on the Issues of Bankruptcy Proceedings in Bilateral and Multilateral International Agreements // Bulletin of the St. Petersburg University of the Ministry of Internal Affairs of Russia. – 2006. – N 3. – P. 76–78.

3. COUNCIL REGULATION (EC) N 1346/2000 of 29 May 2000 on Insolvency Proceedings // European Union. – URL: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:160:0001:0018:en:PDF (Referral Date December 24, 2017).

4. *Doetsch D. A*., *Hammer A. L*. Observations on Cross-Border Insolvency and Their Resolution in the NAFTA Region: Where Are We Now? // United States – Mexico Law Journal. – 2002.

5. *Kalinina N. V.* Problems of Regulation of Cross-Border Insolvency in Private International Law: the Author's Abstract of the Dissertation. Candidate of Juridical Sciences. – M., 2010.

6. *Kuznetsov A.* Transnational Corporations of the BRICS Countries // World Economy and International Relations. – 2012. – N 3. – P. 3–11.

7. *Leanovich E. B.* Development of International Legal Regulation of Cross-Border Bankruptcies // Belarusian Journal of International Law and International Relations. – 2004. – N 4. – P. 20–22.

8. Lidjanova A. Cross-Border Insolvency (Bankruptcy): Problems of Legal Regulation. – URL: http: //xn----7sbbaj7auwnffhk.xn--p1ai/article/ 18156 (Date of Circulation December 24, 2017).

9. Mokhova E. V. Doctrine of the Main Production in the Case of Cross-Border Insolvency of Legal Entities: Thesis ... Candidate of Juridical Sciences. – M., 2009.

10. *Ryaguzov A. A.* Legal Regulation of Cross-Border Insolvency: the Abstract of the Dis. ... Candidate of Juridical Sciences. – M., 2008.

11. Statistics of Exports and Imports by Different Countries. – URL: https://atlas.media.mit.edu/en/ (The Reference Date is 12/24/2017).

12. UNCITRAL Model Law on Cross-Border Insolvency, 1997. – URL: http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html (Referral Date December 24, 2017).