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Conflict and Response to the Jurisdiction in Maritime Cross-border Insolvency Cases

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Abstract: Economic globalization has led to the continuous increase of multinational companies and enterprise groups in the field of shipping, an international and fully open international shipping market has initially formed, and the foreign-related business of shipping companies has also increased. But since the financial crisis, the shipping industry has been in a downturn, and bankruptcy cases of shipping companies continue to occur. In 2012, the world's second largest independent tanker operator, Overseas Ship Holding Group Inc (OSG), filed for bankruptcy protection; in 2013, STX Dalian went bankrupt; in 2014, the world's largest marine fuel oil supplier (OW Bunker) declared bankruptcy; in 2017, Hanjin Shipping, the world's seventh largest shipping company, was declared bankrupt by a South Korean court. In this paper, we focus on the analysis for the legislative provisions and problems in judicial practice of the jurisdictional system of maritime cross-border insolvency cases, summarize the factors affecting the jurisdictional system of maritime cross-border insolvency cases by combining the criteria and theories of jurisdictional determination, draw on the legislative and judicial practice experience of major shipping countries, and put forward feasible suggestions to improve the jurisdictional system of maritime cross-border insolvency cases. This dissertation analyzes the conflict of jurisdiction between maritime and bankruptcy in the same jurisdiction and the conflict of jurisdiction in different jurisdictions from both horizontal and vertical dimensions; theoretically and practically, through the current regulations and judicial practice of China and major shipping countries, it puts forward feasible suggestions to improve the jurisdictional system of maritime cross-border bankruptcy cases in China.

Keywords: Cross-border Insolvency, Maritime Insolvency, Jurisdictional Regimes, Judicial Cooperation

1. Introduction

Shipping business is a typical capital-intensive industry, as shipping companies need a large amount of capital to maintain normal operations. The cyclical nature of the shipping industry is also very significant. We could find out from the Baltic Dry Index (BDI) that it had accelerated upward since the beginning of this year, soaring to 5650 points on October 7, a 13-year high, but has fallen all the way since then, which means the shipping industry has passed the most prosperous period. According to the theory of balance and cycle, the shipping industry will face another round of "winter". For shipping enterprises, especially cross-border shipping enterprises, if the supply exceeds the demand in the shipping market, the global freight prices will fall to a certain extent and the enterprises will face the capital problem that the banks are not willing to issue new loans because of their unaffordable bank loans. The problem of broken capital chain will inevitably produce a domino effect, leading to the emergence of maritime cross-border bankruptcy cases. So far there is no unified international rules in dealing with jurisdictional issues in the maritime cross-border insolvency case. As maritime insolvency cases themselves have certain special characteristics, the laws of each country or region have a certain degree of difference in this issue, the phenomenon of conflict of jurisdiction arises, making jurisdictional issues of maritime cross-border insolvency cases become more complex. In the study of jurisdictional conflicts and countermeasures in cross-border maritime bankruptcy cases, DR Thomas argued in The Law & Practice of Admiralty Matters that the bankruptcy law hardly mentions how to deal with the issue of maritime rights in rem. And it is also very

difficult to incorporate admiralty proceedings into the disparate language of insolvency law. In Ocean Ship Supply v. The Leah, the Fourth U.S. Circuit held that it accepted the view that Canada did not give the plaintiff a maritime lien for the supply of necessities, rejected any lien and released the vessel. Lynn Lopkey argues in the article "International Bankruptcy Cooperation" that the theory of cooperative territoriality requires that the courts of a country have the right to decide how to dispose of the bankruptcy estate located in the country. Based on this, the main purpose of this paper is to explore the causes and strategies of conflict of jurisdiction in maritime cross-border insolvency cases.

2. Reflections Arising from the Hanjin Shipping Bankruptcy

Hanjin Shipping was once the top one liner company in Korea and also the seventh largest one in the world. More than 200 container ships, bulk carriers and liquefied natural gas (LNG) carriers were owned by Hanjin Shipping before its bankruptcy. Due to a combination of factors, Hanjin Shipping fell into a serious liquidity crisis. In order to reduce the unfairness to other creditors caused by the private attachment of creditors, Hanjin Shipping's bankruptcy administrator filed for bankruptcy protection in 11 countries in the hope that these countries would recognize the bankruptcy proceedings made by the Korean court and thus release the preservation measures such as ship attachment [1]. The following section analyzes the different ways of handling maritime cross-border bankruptcy cases in three representative countries, which are United States, Singapore and China, with a view to arriving at the optimal solution to the jurisdictional issues of maritime cross-border bankruptcy cases in China in the future.

The U.S. was one of the countries that gave Korea the maximum assistance in its bankruptcy proceedings in the Hanjin Shipping bankruptcy case among the world. It has adopted the doctrine of universalism with respect to the extraterritorial effect of its jurisdiction in maritime cross-border bankruptcy cases. That is, all litigation and proceedings concerning Hanjin Shipping in the U.S. are stayed, which also includes the ships on Hanjin Shipping's bareboat charter. This shows that the U.S. law focuses on the protection of the rights of the bankrupt debtors. In this case, the creditors on the U.S. side raised the principle of public policy exception. The U.S. court judge held that the public policy exception was consistent with U.S. law, but that the Hanjin Shipping bankruptcy did not violate the public policy principle.

Singapore had been recognized by the jurisprudence as the archetype of territoriality in dealing with related cross-border insolvency cases. In recent years, as a result of the influence of the growing jurisprudence of the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency (hereinafter referred to as the Model Law) in common law systems, the Singapore courts have formally adopted the Model Law, and the modified universalism espoused, into their legal system when dealing with the Hanjin Shipping insolvency case.

Through the data on the website of the Judicial Documents in November 2021, there are currently 86 cases of first instance related to Hanjin Shipping in China, of which only 3 are heard by other ordinary courts. And except for the case of Ping An Dalian Company, all the remaining first instance cases of Hanjin Shipping were adjudicated in absentia. Specifically, the standard for determining the jurisdiction of maritime cross-border bankruptcy cases in China is the domicile standard, and the "domicile" here should be understood as the location of the main office. However, Hanjin Shipping's main office is not located in China, but in Korea, so China cannot exercise jurisdiction over this case. In addition, China is not a party to or has not signed any international treaties in the field of maritime cross-border insolvency, and there is no reciprocal relationship with Korea in the field of maritime cross-border insolvency, therefore, it is unlikely that the insolvency proceedings made by the Korean court will be recognized and enforced in China.

The special nature of maritime disputes requires the trial parties to have strong professionalism, so most countries or regions distinguish maritime disputes from insolvency disputes and have different courts to govern the relevant disputes. It is argued that non-maritime courts are not aware of the special legal system and procedures in the field of maritime affairs and maritime commerce as well as the relevant international conventions. Under this condition, if all maritime cases are put under the jurisdiction of bankruptcy courts, the special characteristics of maritime affairs and maritime commerce will be completely ignored. The U.S. court in Millenium held that since the maritime claimant brought the dispute to the bankruptcy court for judgment, it gave the bankruptcy court the power to eliminate its rights [2]. In contrast, the Singaporean court in the Hanjin Shipping bankruptcy case held that the special nature of maritime cases did not distinguish them from bankruptcy proceedings and that they remained within the jurisdiction of bankruptcy law and should be under the exclusive jurisdiction of the High Court. The above diametrically opposed views may illustrate that there are different views and decisions in various countries as to whether maritime insolvency cases are exclusively under the jurisdiction of maritime courts.

3. Issues of the Jurisdictional Regime for Maritime Cross-border Insolvency Cases in China

3.1. Legal Definition of the Concept of Maritime Cross-border Insolvency

Maritime cross-border insolvency, as an emerging term, has not only the foreign nature of cross-border commercial insolvency, but also the introduction of maritime systems and procedures, as opposed to cross-border commercial insolvency. At present, the laws, international treaties and international rules of most countries or regions have hardly

taken into account the special characteristics of this type of cases. Therefore, the handling of issues related to maritime cross-border insolvency cases is still mainly based on the general principles and rules of each country or region on cross-border insolvency cases. In the following section, We will divide the maritime cross-border insolvency into two parts for conceptual clarification, which are cross-border insolvency and maritime insolvency.

The so-called cross-border insolvency, in which the previous view is that "cross-border" refers to crossing national borders, has the following three views in academic circles. The first view is that cross-border insolvency only refers to the property of the insolvent debtor crossing national borders, which means that it is located in two or more countries [3]. The second view adds that the insolvent creditor and the insolvent debtor belong to two or more countries [4]. The third view, based on the second view, increases that the bankruptcy debtor-debtor relationship is governed by foreign law [5]. We consider that on the basis of the existence of multi-jurisdictional countries, for example, China is a country under one country, two systems, three systems and four domains, while the jurisdictions of Hong Kong, Macao and Taiwan are different from those of the mainland. Therefore, for the interpretation of cross-border bankruptcy, it should be across jurisdictions, rather than across national borders.

The so-called maritime insolvency is referred to as "cross-border insolvency in maritime field" [6] by domestic scholar Guan Zhengzhi while foreign scholar Phoebe-Hathorn referred to it as "the impact of cross-border insolvency on maritime claims" [7], which usually refers to shipping enterprises in the sense of The bankruptcy of shipping enterprises. The legal relationship adjusted by maritime cross-border bankruptcy focuses on the relationship between the property rights of ships and the corresponding claims related to ships in the bankruptcy of international shipping enterprises. Due to the high property value of the ship itself, after the bankruptcy of the shipping enterprise, the subject ship becomes the main target of the creditors, and most of the creditors want to seize the ship to ensure the maximum satisfaction of their claims through the ship lien and the exercise of the priority of the ship [8], which is the biggest difference between the maritime cross-border bankruptcy and the general cross-border bankruptcy.

In summary, the author believes that maritime cross-border insolvency acts as a special form of cross-border insolvency, and the understanding of the concept is based on the understanding of cross-border insolvency and maritime insolvency. In other words, the definition of its concept includes two aspects, one is the subjects, objects in the legal relationship of insolvency as well as the rights and obligations located in two or more jurisdictions; the second is the introduction of maritime systems and procedures.

3.2. Current Provisions of China's Jurisdictional System for Maritime Cross-border Insolvency Cases

The jurisdictional standard of cross-border bankruptcy cases established by Article 3 of *Enterprise Bankruptcy Law of the People's Republic of China* (hereinafter referred to as the "Bankruptcy Law") is based on the domicile of the bankrupt. In terms of the extraterritorial effect of jurisdiction in cross-border bankruptcy cases, if a judgment is rendered by a court in China, it is legally binding not only on the bankruptcy assets of the bankruptcy creditor in China, but also on the bankruptcy assets in other countries or regions; if a judgment against the same insolvent debtor is rendered by a court in another country or region, then for such judgment to be recognized and enforced in our country and to have legal effect on the insolvency estate in our country, a reciprocal relationship or international treaty must exist in the area of cross-border insolvency, with the proviso that there are no circumstances contrary to the six exceptions, such as our public policy. Article 47 of *the Provisions of the Supreme People's Court on Several Issues Concerning the Application of the Enterprise Bankruptcy Law of the People's Republic of China (II)* holds that the jurisdictional court for bankruptcy derivative litigation should, in principle, under the control of the people's court that accepts the bankruptcy case, but when it cannot exercise jurisdiction due to maritime disputes concerning the bankruptcy debtor, it can request the appointment of jurisdiction by a higher people's court over the bankruptcy case in accordance with the relevant provisions of the Civil Procedure Law.

Article 26 of *the Model Law of the People's Republic of China on Private International Law*, for cross-border insolvency cases, adopts the standard of the location of the main office of the insolvent debtor and the location of the insolvent debtor's property as the standard of jurisdiction for cross-border insolvency cases. However, from the perspective of whether the subject has legislative power, *the Model Law of the People's Republic of China on Private International Law* is only an academic opinion drafted by the Institute of Private International Law, with no compulsory and legally binding effect from the perspective of legal effect.

From the viewpoint of international treaties, since at present China has not participated in or signed any international treaties or conventions in the field of maritime cross-border insolvency, nor has it signed bilateral or multilateral agreements with other countries or regions. Even though China has participated in the negotiation of the Model Law and tried to reach consensus with other countries or regions on relevant issues. But from the current situation, the possibility of formulating unified international rules is much lower than judicial cooperation in the short term because of the multiple interests involved.

3.3. Problems of Jurisdictional System for Maritime Cross-border Bankruptcy Cases in China

The problems of jurisdictional system for maritime cross-border bankruptcy cases in China are mainly divided into two aspects: First, at the level of the same jurisdiction, the conflict between maritime insolvency and ordinary commercial insolvency is resolved, i.e., which court in a country or region should apply which law to hear according to which procedure and system. Here involves China's lack of jurisdictional system for maritime cross-border insolvency

cases and the consideration of the special nature of maritime insolvency [9]. Secondly, at the level of different jurisdictions, to solve the attribute of cross-border bankruptcy involving foreign nature, that is, which country or region should be heard by the court, here involves our courts and insolvency administrators in the field of maritime cross-border bankruptcy judicial cooperation to be strengthened.

Of course, because the jurisdictional system of maritime cross-border insolvency cases often involves the judicial sovereignty and public policy of a country or region, the treatment of this issue should first analyze which country or region should be placed within the jurisdiction before discussing the issue of conflict of jurisdiction between countries or regions.

3.3.1. Lack of Provisions on Jurisdictional Regime for Maritime Cross-border Insolvency Cases

From the perspective of domestic legislation, *the Bankruptcy Law* only provides in principle the criteria of jurisdiction and extraterritoriality for cross-border bankruptcy cases, and no mention is made of the jurisdiction of maritime cross-border bankruptcy cases, which is obviously caused by the fact that the special characteristics of maritime cross-border bankruptcy cases were not taken into account when *the Bankruptcy Law* was formulated.

From the standpoint of international treaties, both *the Model Law* and *the EU Rules* provide relatively clear answers to the relevant issues in the area of cross-border insolvency. The purpose of *the Model Law* is to unify insolvency proceedings to allow more creditors to be paid and to avoid the occurrence of multiple proceedings and individual discharges, thereby effectively addressing cross-border insolvency entanglements and protecting the interests of insolvent enterprises. In order to ensure that the enacting State is able to safeguard the State's own interests and respect the effectiveness of its public policy and specific systems when necessary, *the Model Law* provides for coordination of parallel insolvency proceedings, etc [10]. However, neither *the Model Law* nor *the EU Rules* are universally legally binding in the area of cross-border insolvency on a global scale.

As can be seen from the above, the current legislation in China lacks provisions on the jurisdictional system for maritime cross-border insolvency cases. The only part of the provisions is mostly in principle, but there are large controversies in practice. More even some provisions of the content is completely opposite, then whether the shipping enterprise bankruptcy case can be accepted by the maritime court? Can the maritime litigation concerning the bankrupt shipping enterprise which has been started before the people's court accepts the bankruptcy application and the maritime litigation which is not yet finished after the people's court accepts the bankruptcy application continue to be under the jurisdiction of the maritime court after the suspension? After the people's court accepted the bankruptcy application, should the maritime litigation concerning the bankrupt shipping enterprise be brought to the people's court that accepted the bankruptcy application or to the maritime court? This adds difficulty for the court to deal with the jurisdictional issues of maritime cross-border bankruptcy cases.

3.3.2. Lack of Consideration of the Specificity of Maritime Insolvency

At present, more and more countries or regions establish maritime and maritime legal system centering on ships, mainly because of the special nature of ships, which makes them obviously different from other properties in civil and commercial laws. The special nature of the ship is mainly manifested as: one is the strong mobility; the second is that once the maritime accident happened, it caused a large loss. Based on the special nature of ships, many special systems and procedures have been formulated at the beginning of maritime and maritime law, with the purpose of protecting the rights of maritime claimants. Taking the general principles of cross-border insolvency legal system as the basis, the special features of maritime insolvency need to be considered, mainly including the following three aspects: First, which court should have jurisdiction over the maritime cross-border insolvency case, or whether the two courts have separate jurisdiction over the part within their respective jurisdictions? Secondly, should the maritime proceedings commenced before the insolvency proceedings be suspended? Third, on the basis of the second aspect, if the maritime proceedings are suspended, should the maritime preservation measures also be lifted?

3.3.3. Judicial Cooperation in Maritime Cross-border Insolvency Needs to Be Strengthened

In the absence of an international treaty or reciprocity, it is entirely up to China to decide whether to recognize the bankruptcy declaration, whereas in reality our courts usually do not recognize and enforce such judgments. From the current perspective, China has hardly taken the initiative to adopt judicial cooperation in the field of cross-border bankruptcy, but the United States has first recognized and implemented the judgment made by our courts. In the case of Zhejiang Jianshan Optoelectronics, the United States showed a good attitude of active cooperation with China on cross-border bankruptcy, and recognized the bankruptcy reorganization procedures made by our courts, becoming the first case of recognition of bankruptcy procedures in China by the United States. This is a good start for China's future recognition of U.S. bankruptcy proceedings. It can be seen that in the field of maritime cross-border bankruptcy, China's judicial cooperation needs to be improved, especially the initiative to take judicial cooperation should become the main way.

4. Extraterritorial Theory and Practice of Jurisdictional Regimes for Maritime Cross-border Insolvency Cases

4.1. Jurisdictional Standards and Extraterritoriality in Maritime Cross-border Insolvency Cases

Maritime cross-border insolvency case is a special form of cross-border insolvency case, so it does not differ from the

standard of jurisdiction determination of cross-border insolvency case. The following article starts from the specific provisions of the four standards of major shipping countries for the determination of jurisdiction of cross-border bankruptcy cases, and analyzes the advantages and disadvantages of the four standards at present, with a view to providing theoretical support for the determination of the standards of jurisdiction of maritime cross-border bankruptcy cases in China.

Article 265(1) of *the UK Insolvency Act 1986* and *Article 166(1) of the Swiss Private International Law (PIL)* use domicile as a criterion for determining jurisdiction in cross-border insolvency cases. Although most countries in the international community use domicile as one of the criteria for determining jurisdiction in cross-border insolvency cases, there are certain procedural differences in the understanding of domicile in the laws of each country or region.

The German Insolvency Act uses the place of business as the criterion for determining the right of relationship in insolvency cases and provides for the treatment of the principal place of business as the place where there is a dispute as to the existence of multiple places of business [11].

According to English jurists Dicey and Morris, the so-called "place of business" requires the following two conditions: first, there must be a fixed and definite location; second, the business activity must have continued for a period of time sufficient to be recognized by another third party as a single transaction [12]. Using the place of business as the standard for jurisdiction in cross-border insolvency cases can protect the interests of creditors in the country or territory of the place of business to a certain extent. In this way the jurisdictional standard applicable in the event of future insolvency can be foreseen at the time of dealing with the debtor. However, there are difficulties in identifying the standard of place of business.

The Swiss Federal Private International Law [13], *the Spanish Code of Civil Procedure* [14] and the English Kempinia insolvency case [15] have all adopted the location of property as the criterion for determining the jurisdiction of cross-border insolvency cases. By using the location of property as the criterion for jurisdiction in cross-border insolvency cases, the insolvency creditor can keep track of the insolvent debtor's ability to perform its debts. If once the insolvent debtor is found to be unable to perform its debts, it can request the court to take preservation measures, making the property available for enforcement after the cross-border insolvency case is resolved. Although this standard can safeguard the interests of creditors in this country or region [11], it is at the expense of causing damage to the interests of creditors in other countries or regions, which is contrary to the principle of fair and equitable treatment required by the bankruptcy law.

4.1.1. Extraterritorial Effect of Jurisdiction in Maritime Cross-border Insolvency Cases

Maritime cross-border insolvency cases are a special form of cross-border insolvency cases, therefore they do not differ from the theory of extraterritorial effect of jurisdiction of cross-border insolvency cases. The following article starts from the theory of extraterritorial effect of jurisdiction of cross-border bankruptcy cases, analyzes the development of the theory as well as their respective advantages and disadvantages, and expects to provide theoretical support to determine the extraterritorial effect of jurisdiction of maritime cross-border bankruptcy cases in China.

The recognition of cross-border insolvency proceedings is a prerequisite for the existence of international cooperation in insolvency cases; in other words, extraterritoriality refers to the legal consequences of insolvency proceedings conducted in the territory of a country with respect to the insolvent's property abroad and the effect of the corresponding offshore insolvency proceedings on the foreign debtor's property located in this country. Specifically, this includes whether ordinary foreign proceedings and enforcement proceedings against the insolvency estate are suspended, whether preservation proceedings are discharged, whether the administrator of the insolvency estate may exercise the right of repossession over the debtor's property abroad, and the effect of early discharge of the debtor's outstanding debts or provision of security for debts after the bankruptcy case is accepted or before the declaration [16].

4.1.2. International Organizations and International or Regional Legislation

The CMI Cross-Border Insolvency Working Group was established to address issues related to the regulation of maritime cross-border insolvency on an international scale. The cross-border insolvency working group is to analyze and compare the differences between the responses to the questionnaire of the member countries on issues related to maritime cross-border insolvency cases, find the best solution on how to coordinate the jurisdiction of maritime cross-border insolvency cases and other issues, put forward their own suggestions and opinions, and finally publish them to the society in a timely manner. At present, the working group has received responses from 15 countries, including China.[1] From the results of the responses, there are three main legislative models: first, *the Model Law* model; second, *the EU Rules* one; and third, neither *the Model Law* nor *the EU Rules* are adopted.

The Model Law was originally developed to provide a reference for the establishment of uniform legal regulation of cross-border insolvency on a global scale, hence its provisions on cross-border insolvency jurisdiction, "main-subsidiary-parallel" insolvency proceedings, and the recognition and enforcement of insolvency proceedings [17]. *The Model Law* adopts a "composite insolvency regime", allowing multiple insolvency proceedings to be commenced in more than two States for the same debt. Article 2(b) of *the Model Law* provides for the main insolvency proceeding and article 2(c) for the non-main insolvency proceeding. Articles 20 and 21 of the Law further provide for the effects of each of

1 http://www.uncitral.org/uncitral/zh/uncitral_texts/insolvency/1997Model_status.html.

the two different proceedings: in the case of a foreign main proceeding, the consequences of recognition typically include a stay of actions by individual creditors against the debtor or a stay of enforcement proceedings concerning the debtor's assets and a termination of the debtor's right to transfer or encumber its assets. In the case of a foreign non-main proceeding, "discretionary" relief is granted, i.e., the court has discretion whether to stay an insolvency proceeding in this State or to freeze the relevant property.

The EU Rules differ from *the Model Law* in that they are uniform rules that are generally binding across EU member states, whereas *the Model Law* only provides guidance and recommendations [18]. Unless the rules themselves provide for exceptions, even if the domestic legislative provisions of EU member states conflict with them, they should be resolved in accordance with the provisions of *the EU Rules*. It can be said that, compared with *the Model Law*, it is a uniform rule in the field of regional cross-border insolvency, moreover, its provisions are worthy of our reference and reference when formulating the regulations in the field of maritime cross-border insolvency.

4.2. Trends in International Cooperation in Resolving Jurisdictional Issues in Maritime Cross-border Insolvency Cases

Since there are no unified international rules in the field of maritime cross-border insolvency, each country or region is mainly based on its own law, which also causes the standard of jurisdiction and the theory of extraterritorial effect of maritime cross-border insolvency cases in each country to differ greatly. When formulating laws, countries or regions must first consider the interests of their own countries or regions. In terms of the criteria for determining jurisdiction, there is no single standard that can completely solve the problem of jurisdiction in maritime cross-border cases, because each standard has its own advantages and disadvantages. In terms of the extraterritoriality of jurisdiction in maritime cross-border insolvency cases, the different theories of the extraterritoriality of maritime cross-border insolvency jurisdiction in the laws of each country or region reflect different legal values.

Admiralty and maritime law is based on the development of international maritime trade, and the industry customs formed by shipping practice are legislated [19]. Bankruptcy law is to protect bankruptcy creditors for fair and just distribution of benefits, while admiralty and maritime law disputes are a collision between the rights and obligations of the two parties. Bankruptcy law, on the other hand, breaks through the relativity of contracts, reflects the public power of the state, and achieves fairness as a whole rather than individual fairness.

The differences in national insolvency laws have already hindered the unification of cross-border insolvency, so it is not feasible to develop a special maritime cross-border insolvency quasi [20]. The current models of international cooperation are mainly divided into regional and global cooperation models. The regional model of cooperation is to meet the needs of member states or regions within a certain region for judicial cooperation, and this model is mainly through the form of multilateral treaties, represented by *the EU Rules* [21].

5. Improving the Jurisdictional System of Maritime Cross-border Bankruptcy Cases in China

We intends to explore the suitable way to deal with the jurisdiction of China's maritime cross-border bankruptcy cases combined with the standards and theories of cross-border bankruptcy jurisdiction determination to explore the practical experience of major shipping countries through the previous article for the current situation of China's maritime cross-border bankruptcy legislation and the existing problems.

5.1. Achievement of Jurisdictional Coordination and Partial Adoption of the Model Law

The Hanjin Shipping bankruptcy case was supposed to be a unique stress test opportunity for the Model Law to be adopted in China, but due to the lack of relevant preparatory work and lack of communication, the maritime cases related to the Hanjin Shipping bankruptcy case in China were eventually resolved on a case-by-case basis [22]. All along, when dealing with the jurisdiction of cross-border bankruptcy cases, China has adopted the principle of broader jurisdiction, which is not easy to be recognized and assisted by other countries or regions. The traditional jurisdictional standard based on the office as well as the place of registration as determined by China's Bankruptcy Law is no longer suitable for the needs of cross-border trade development. Therefore, We suggests that when improving the jurisdictional system for maritime cross-border insolvency cases, China should draw on the relevant practices of the Model Law on insolvency proceedings and divide the cross-border insolvency proceedings into two categories, namely, main insolvency proceedings as well as auxiliary insolvency proceedings, so as to solve the problem of jurisdictional conflicts brought about by multiple parallel insolvency proceedings. Specifically, the insolvency proceeding made by the court in the location of the center of main interests for maritime cross-border insolvency cases is recognized as the main insolvency proceeding, which can also be commenced by the court in the place of business, but the insolvency proceeding is ancillary to the insolvency proceeding.

At the same time, a country or region's theory of maritime cross-border insolvency jurisdiction is not static, nor does it completely adhere to one theory and reject another. For the theory of maritime cross-border insolvency jurisdiction, the current international mainstream view is the revised universalist theory. Although Article 5 of China's Bankruptcy Law formally adopts the amended universalist theory, it still has not escaped the influence of the territorialist theory for a long period of time, setting up a review procedure for the

recognition of foreign bankruptcy proceedings and the enforcement of judgments, and establishing more exception rules. Therefore, although the legislation has progressed, it only provides the beginning to alleviate the jurisdictional problems of maritime cross-border insolvency cases. Therefore, We suggests that when improving the jurisdictional system for maritime cross-border insolvency cases, whether the six exception principles currently provided for should be considered appropriately reduced to achieve the possibility that insolvency proceedings made by foreign or regional courts can be recognized and enforced in China.

5.2. Consideration of Maritime Factors on the Ground of the Bankruptcy Code

Since the Bankruptcy Law was formulated with the background of general enterprise bankruptcy, the special features of maritime and maritime legal system and procedures were not taken into consideration at that time. Based on the aforementioned disagreement between specialized maritime jurisdiction and centralized bankruptcy jurisdiction in the law, the author believes that maritime cross-border bankruptcy cases under the current law should be filed with the People's Court. For provinces without maritime courts may have the problem of the need to report to the Supreme People's Court for appointment at each level, the author believes that the current short-term response is to try the relevant maritime disputes on their own as far as possible without violating the provisions of the law. In the long run, the regional setting and jurisdiction of the maritime court or need to be further optimized, compressed coordination costs.

The bankruptcy procedure runs through the whole process of enterprise bankruptcy, and is a procedure that is not available in the maritime litigation process, which is also a procedure that cannot be replaced by other laws and regulations. Therefore, the author believes that the special nature of maritime litigation does not completely replace the dominant position of bankruptcy proceedings in the process of enterprise bankruptcy, and that bankruptcy proceedings should be conducted in principle in accordance with the provisions of the Bankruptcy Law. In exceptional cases, only in the interests of protecting the rights and interests of both parties, the court receiving the bankruptcy to adjust the application of bankruptcy procedures, the appropriate invocation of the provisions of the maritime special procedures. Therefore, the provisions of the Bankruptcy Law should be applied to the issue of maritime special procedure and bankruptcy procedure. Even in the absence of provisions in the Bankruptcy Law, maritime special procedures cannot be directly applied.

For the maritime proceedings that precede the bankruptcy proceedings, I suggest that we should learn from Singapore's treatment of Hanjin Shipping. Singapore has excluded ship arrests that occur prior to the commencement of bankruptcy from the bankruptcy proceedings altogether [23], i.e. the progress of the maritime proceedings should be analyzed and the maritime proceedings should be suspended when the maritime proceedings are affected by our recognition of the bankruptcy proceedings made by the foreign or regional court. The ships that have been arrested are handed over to the people's court receiving the bankruptcy case for unified management and distribution, and the ships that have not yet been arrested shall not be subject to maritime preservation measures.

The special nature of the maritime preservation system makes the bankruptcy preservation system cannot be applied to all the maritime procedures, and We thought we should make a distinction between different aspects of it. The main reason is that if the bankruptcy preservation system is fully applied to maritime procedures, then the maritime claimant's rights under *the Maritime Law* will not be realized, which is obviously contrary to the legislative purpose of *the Maritime Law*. This would result in the maritime claimant losing its security right under *the Maritime Law*. Once the maritime proceedings are suspended, it means that the preservation measures taken will be lifted and the ship for which the maritime claimant has applied for arrest can leave the jurisdiction of a state or territory, reducing the possibility for the maritime claimant to apply for arrest later and losing all its original security rights to priority claims. This is manifestly unfair to the maritime claimant.

5.3. Case Consultation and Prior Benefit to Strengthen Judicial Cooperation

The problem of "recognition difficulties" often arises in the handling of cross-border cases in China, especially in the maritime cross-border bankruptcy cases. Therefore, how to strengthen the judicial cooperation in the maritime cross-border field and solve the long-existing recognition and enforcement difficulties plays a positive role in improving China's maritime cross-border bankruptcy system.

It is difficult for sovereign states to reach consensus on issues in the field of international civil and commercial jurisdiction due to the consideration of protecting their own interests [24]. From the perspective of international treaties, at the moment, China has not participated or engaged in any international treaties or conventions in the field of maritime cross-border insolvency. From the current situation, the differences in insolvency laws of various countries have hindered the unification of cross-border insolvency, that is to say, it is not feasible to formulate special maritime cross-border insolvency guidelines, and the possibility of coordination is higher than unification in the short term. This form of judicial cooperation, not only can protect the interests of our creditors, but also for the maritime cross-border field of judicial cooperation plays a positive role.

From the perspective of reciprocity, although the principle of reciprocity has been generally followed by the international community, with the increasing international trade and the formation of various disputes, countries have gradually begun to realize that the traditional principle of reciprocity can set certain obstacles to cross-border civil and commercial activities. In particular, the traditional principle of reciprocity refers to whether the court of a country or region recognizes

and enforces a judgment rendered by the court of our country or region for the applicant's country or region. Judicial practice in China shows that there are relatively few cases in which China has taken the initiative to recognize and enforce judgments rendered by courts in other countries or regions. Promoting the change of the traditional reciprocity principle is not only to adapt to the trend of international development, but also to demonstrate China's position of actively engaging in judicial cooperation in the field of maritime cross-border insolvency.

A flexible and progressive approach to harmonization is appropriate for the formation of regional multilateral mechanisms for cross-border insolvency [25]. Currently, countries or regions are taking different measures to change the traditional principle of reciprocity. Among them, the first-benefit approach is the most common and is supported by countries or regions. *The Opinions on the People's Courts' Provision of Judicial Services and Protection for the Construction of "One Belt, One Road"* and *the Nanning Statement* both give full recognition to the first-come-first-served benefits. It is an important way to actively promote international judicial cooperation in the field of maritime cross-border affairs, as it breaks through the traditional principle of reciprocity and solves the difficult problems of recognition and enforcement between countries or regions.

Naturally, compared to ordinary civil and commercial judgments, maritime cross-border insolvency is a more cautious part of countries or regions in the field of judicial cooperation. Thus, when dealing with relevant issues in China, we also need to make certain restrictions on the scope and conditions of application of the first ex gratia. The author suggests that it can be applied first to countries or regions that adopt *the Model Law*.

6. Conclusion

The preceding analysis of China's jurisdictional regime for maritime cross-border bankruptcy cases through case study method and comparative study method can lead to the following conclusions.

First, the insolvency proceeding made by the court in the place of the center of main interests for maritime cross-border insolvency cases is recognized as the main insolvency proceeding. The court of the place of business, on the other hand, may also commence an insolvency proceeding, but that insolvency proceeding is a subsidiary insolvency proceeding, thereby achieving coordination between multiple parallel insolvency proceedings.

Second, the special nature of maritime litigation does not completely replace the dominant position of bankruptcy proceedings in the enterprise bankruptcy process. Maritime cross-border bankruptcy cases should be governed by the people's court, and the higher people's court may appoint jurisdiction when it cannot exercise jurisdiction. For the maritime proceedings commenced before the bankruptcy proceedings, whether they have entered the auction process is the criterion, and for the maritime proceedings that have been auctioned are not affected by the foreign bankruptcy proceedings. A maritime claim with a security right in rem may be exempt from *the Bankruptcy Law*.

Third, the formation of international treaties is actively promoted by means of case-by-case consultations and to understand the traditional reciprocity in the Bankruptcy Code as prior benefit.

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