(Vol. 3)

Peking University Journal of Legal Studies

Lehman' s Spill-over Effects: Cooperation v. Regulatory Arbitrage?

Rainer Kulms

Expired Peace Clause: Claims under WTO' s Agreement on Subsidies & Countervailing Measures and Agreement on Agriculture

Li Xiaoling

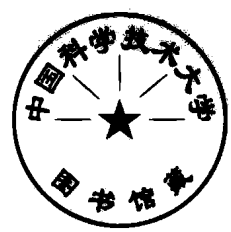
Problems in Following E.U. Competition Law: A Case Study of *Coca-Cola/Huiyuan*

Zhang Huyue

北京大学出版社
PEKING UNIVERSITY PRESS

Peking University Journal of Legal Studies

(Vol. 3)



北京大学出版社
PEKING UNIVERSITY PRESS

图书在版编目(CIP)数据

北京大学法学研究 = Peking University Journal of Legal Studies. vol. 3. 第 3 卷:英文/郭雳主编. —北京:北京大学出版社,2012.1

ISBN 978-7-301-19989-3

Ⅰ. ①北… Ⅱ. ①郭… Ⅲ. ①法学-文集-英文 Ⅳ. ①D90-53

中国版本图书馆 CIP 数据核字(2011)第 272869 号

书　　名: **Peking University Journal of Legal Studies(Vol. 3)**
著作责任者:郭　雳　主编
责 任 编 辑:李　兵
标 准 书 号:ISBN 978-7-301-19989-3/D·3026
出 版 发 行:北京大学出版社
地　　址:北京市海淀区成府路 205 号　100871
网　　址:http://www.pup.cn　电子邮箱:law@pup.pku.edu.cn
电　　话:邮购部 62752015　发行部 62750672　编辑部 62752027　出版部 62754962
印　刷　者:北京富生印刷厂
经　销　者:新华书店
787 毫米×1092 毫米　16 开本　17 印张　284 千字
2012 年 1 月第 1 版　2012 年 1 月第 1 次印刷
定　　价:42.00 元

Editors' Foreword

"International" is indeed the key word for this third volume of Peking University Journal of Legal Studies. Not only are the authors from Brussels, Hamburg, New York, Oxford, Shanghai and Beijing, and most of them graduated from and feel attached with PKU Law School, but in addition their papers address issues of international significance such as the WTO and Lehman Brothers, peruse cases with international impact like Coca-Cola/Huiyuan, and explore ways of improvement for Chinese contract, company, and financial laws by drawing on international experiences. Meanwhile in the symposium section, three articles elaborate from different perspectives on the principles and measures to enhance intellectual property rights protection in China. Finally, a statistical study conducted by Shenzhen Stock Exchange researchers provides the readers with a vivid picture of the current China's capital markets and their regulatory enforcement.

Rainer Kulms's *Lehman's Spill-over Effects: Cooperation v. Regulatory Arbitrage?*, reviews the meltdown of Lehman and its aftermath. Lehman had been a multinational conglomerate relying on regulatory arbitrage and insouciant about negative externalities in the event of a bankruptcy. European and non-European jurisdictions had to come to terms with the implications of regulatory arbitrage for Lehman's retail structured products. Financial conglomerates questioned the belief that the negative externalities could be contained by comity and cooperative behaviour in the context of cross-border insolvency proceedings. Alternatively, cooperative solutions may be achieved through private party insolvency protocols or cross-border government intervention. As the credit market disruption crept in, the European Union stepped up its cri-

sis management proposing regulatory intervention. On an international level, cooperation produced efforts to anticipate systemic risk by devising early warning mechanisms. This does not yet amount to a substantive public international law rule on cross-border coordination.

Li Xiaoling's *Expired Peace Clause: Claims under WTO's Agreement on Subsidies & Countervailing Measures and Agreement on Agriculture*, exams the evolution of GATT/WTO discipline on agricultural subsidies over the past 60 years and shows that the gap between agricultural subsidies rules and general rules on subsidies has been widening. The breadth of this gap, however, is to some extent dependent on how one deals with the relationship among the AOA, SCM and GATT 1994. The WTO jurisprudence has repeatedly dictated that the AOA, SCM and GATT 1994 provisions should be interpreted harmoniously and applied simultaneously and cumulatively. However, research on the specific relationship between the AOA and SCM in concrete scenarios reveals that such an approach would lead to, in many circumstances, more stringent discipline on agricultural subsidies than those on industrial subsidies. Although this result might effectively promote trade liberalization in agriculture, it runs counter to the intentions of the Uruguay Round negotiators.

Zhang Huyue (Angela)'s *Problems in Following E. U. Competition Law: A Case Study of Coca-Cola/Huiyuan*, reveals that China's Ministry of Commerce (MOFCOM) in the *Coca-Cola/Huiyuan* case appeared to have applied the portfolio effects theory adopted in some E. U. and Australian cases; however, MOFCOM may have failed to realize that this theory is often based on the prediction of exclusionary effects of conglomerate mergers that are too remote and speculative, leading to potential high cost of error and an over-deterrence of efficient transactions. Moreover, the study shows that there has been an increasing international consensus that conglomerate mergers rarely pose anticompetitive effects, and recent E. U. cases have required the European Commission to satisfy a high burden of proof in cases of portfolio effects. Additionally, this paper examines the problems of using the AML to protect domestic small- and medium-sized firms. Finally, the paper discusses the enforcement challenges facing MOFCOM and the need for China to introduce more checks and balances into the merger control regime.

Jon Woo-Jung's *The Assignment of Receivables under the Chinese Contract Law and Some Suggestions*, discusses the assignment of receivables and regulations on securitization in China. China enacted the Contract Law in 1999, and issued several administrative measures to facilitate securitization. There have been growing securitization practices in China, which shows strong developments of the Chinese financial sector. However, this article also points out weak points of Article 80 of the Contract Law, which deals with the assignment of receivables, and the administrative measures for securitization. By comparing the Chinese system with those of other major jurisdictions such as the U. S., England, Germany, France, the Republic of Korea and Japan, suggestions are made which Chinese jurists might well consider in order for China to move into the centre of world finance.

Ge Weijun's *Prohibition of Financial Assistance under International Perspectives: A Possible Model for Chinese Company Law*, deals with one corporate law issue, namely, the control of the financial assistance from the company. The general purpose behind such financial assistance legislation is to assure that a person uses his or her own assets, not the company's assets, to buy that company's shares. Therefore any form of financial assistance is prohibited, so as to avoid the reduction of company assets which may prejudice the interests of the creditors and the minority shareholders, and to prevent market manipulation and management misfeasance. Upon defining financial assistance, this paper outlines the different models of prohibition in the UK and the US, and then gives some suggestions for Chinese law.

Zhang Ping's *For Fairness, Reasonableness, and Non-Discrimination: Necessity to Limit Patent Rights Incorporated into Standards*, discusses the necessity to limit rights in patents incorporated into technological standards by examining the reasons for the introduction of technology standards to the patent field; it also analyzes the justifications for such limitations by examining patent policies of current Standard Setting Organizations (SSO) and related judicial practice. Nowadays, setting technology standards for products inevitably involves "piling, overlapping, and interdependent" patents. To fulfill the goal of "fairness, reasonableness, and non-discrimination", patent rights so incorporated into standards should be subject to appropriate limitations.

Liu Yinliang's *Justification of the Criminal and Administrative Enforcement of Intellectual Property Rights in China: Historical Contexts and Contemporary Scenes*, asserts that the criminal enforcement of intellectual property rights has been an international issue drawing much attention recently. By examination of the historical context and present situation regarding the legislation of intellectual property laws in China, this article justifies the criminal and administrative enforcement of intellectual property rights and explores their respective roles in the construction of the intellectual property system. It is argued that while criminal procedures and penalties could provide deterrence to intellectual property crimes, administrative remedies could also help control and punish intellectual property infringement or counterfeiting that may injure the public interest. China has established a unique system for the enforcement of intellectual property rights that complies with the TRIPS and other international treaties.

Yang Ming's *The Legal and Economic Analysis on the Cross-Class Protection of Well-Known Marks*, demonstrates the fact that the cross-class protection of well-known marks is a widely understood theory and system in the field of trademark law, but the boundaries of such protection are obscure and many debates are raised. In China, the legislation surrounding the protection of well-known marks is fruitful, but the problem still remains. There are two main reasons for this: first, the words used in the legislation are very abstract, and second, cross-class protection has been excessively emphasized. As a result, the standard is seldom uniform when the legislation is applied in judicial practices. For this reason, building a method to analyze the boundaries of protection for well-known marks is needed, so that the relating legislation can be used as a target in judicial practice, and the protection of well-known marks will not be excessive.

Cai Yi, et al.'s *A Statistical Analysis on Administrative Sanctions against Securities Violations in China (2007—2009)*, is aimed at assessing the implementation of administrative sanctions in the securities market of the People's Republic of China (PRC), from an empirical perspective based upon specific statistical analyses. A comprehensive comparative study is therefore conducted on the manner of disposal, types of administrative sanctions, number of sanctioned entities and persons, a-

mount of pecuniary penalties, and annual case closure ratios from several different perspectives in respect of the securities enforcement cases in the years of 2007—2009. Based on the collected information, the authors carry out statistical analysis using six dimensions (violations, violators, amount of pecuniary penalties, and comparisons of pecuniary penalty data between SOEs and private companies, between Shenzhen and Shanghai markets, and between the Main Board and the SME Board of Shenzhen market) and reach some preliminary conclusions. Additionally, relying on the annual reports and data released by various securities and futures regulators (including the US, the UK, Germany, France, India and the Hong Kong area of China), the authors examine general information on administrative sanctions for securities violations in other jurisdictions and provide a preliminary comparison with such sanctions in the PRC.

CONTENTS

Articles

Lehman's Spill-over Effects:
Cooperation v. Regulatory Arbitrage?
..... Rainer Kulms (3)

Expired Peace Clause: Claims under WTO's
Agreement on Subsidies & Countervailing Measures
and Agreement on Agriculture ..... Li Xiaoling (53)

Problems in Following E. U. Competition Law:
A Case Study of *Coca-Cola/Huiyuan*
..... Zhang Huyue (Angela) (96)

The Assignment of Receivables under the Chinese Contract
Law and Some Suggestions ..... Jon Woo-Jung (119)

Prohibition of Financial Assistance under
International Perspectives: A Possible Model
for Chinese Company Law ..... Ge Weijun (150)

Symposium on Intellectual Property Law

For Fairness, Reasonableness, and Non-Discrimination:
Necessity to Limit Patent Rights Incorporated
into Standards ..... Zhang Ping (179)

Justification of the Criminal and Administrative Enforcement of Intellectual Property Rights in China: Historical Contexts and Contemporary Scenes ..... Liu Yinliang (188)

The Legal and Economic Analysis on the Cross-Class Protection of Well-Known Marks ..... Yang Ming (211)

Empirical Study

A Statistical Analysis on Administrative Sanctions against Securities Violations in China (2007-2009) ..... Cai Yi, Chen Bin, Guo Dong & Wang Qiang (239)

Articles

Lehman's Spill-over Effects:

Cooperation v. Regulatory Arbitrage?

Rainer Kulms*

Abstract:

When governments began to save financial institutions on a daily basis, international cooperation became imperative. Lehman had been a multinational conglomerate, relying on regulatory arbitrage, insouciant about negative externalities in the event of a bankruptcy. European and non-European jurisdictions had to come to terms with the implications of regulatory arbitrage for Lehman's retail structured products. Financial conglomerates questioned the belief that the negative externalities could be contained by comity and cooperative behaviour in the context of cross-border insolvency proceedings. Alternatively, cooperative solutions may be achieved through private party insolvency protocols or cross-border government intervention. As the credit market disruption crept in, the European Union stepped up its crisis management proposing regulatory intervention. On an international level, cooperation produced efforts to anticipate systemic risk by devising early warning mechanisms. This does not yet amount to a substantive public international law rule on cross-border coordination.

---

* Priv.-Doz., Dr. Jiur., L. L. M., Senior Research Fellow, Max Planck Institute for Comparative and International Private Law, Hamburg, Germany. This paper was prepared for the CASS Forum & Seventh International Law Forum in Beijing on 20/21 November 2010. Chapter II draws on material presented to the Annual Meeting of the Association of Serbian Business Lawyers in Vrnjačka Banja, Serbia, on 27 May 2010. The author is grateful to the editors of Pravo i Privreda, Belgrade, Serbia, for their permission to use copyright material.

Text:

I. LEHMAN'S LEGACY

Lehman Brothers was a financial conglomerate of 2,985 entities globally, offering cross-border investment bank services and financial products (including structured products) in many jurisdictions, some regulated and others unregulated.[1] In January 2008, Lehman Brothers Holdings, Inc. (LBHI) reported record revenues of nearly US$60 billion and earnings of more than US$4 billion for its fiscal year ending November 2007.[2] Lehman's stock peaked at US$65.73 per share.[3] Less than a year later, on 12 September 2008 Lehman's stock had lost 95% of its January value, closing under US$4 per share.[4] On 15 September 2008, LBHI filed for protection under chapter 11 of the US Bankruptcy Code, triggering the largest bankruptcy in US history.[5] A global banking crisis unfolded, prompting Governments to save banks of systemic importance.[6] Various non-US LBHI subsidiaries went into bankruptcy or were subject to regulatory proceedings under the banking laws of their host states.[7] On 12 May 2009, negotiations on a "cross-border insolvency protocol for the Lehman Brothers Group of Compa-

---

[1] Cf. Committee of European Securities Regulators (CESR), *The Lehman Brothers Default: An Assessment of the Market Impact*, Paris, 23 March 2009 (Ref.: CESR/09-255).

[2] United States Bankruptcy Court Southern District of New York, *In re Lehman Brothers Holdings, Inc., et al., Report of the Examiner Anton R. Valukas* (Chapter 11 Case No. 08-13555), Vol. 1, p. 2 (11 March 2010) (at: http://online.wsj.com/public/resources/documents/LehmanVol1.pdf).

[3] Ibid., p. 2. (in January 2008).

[4] Ibid., p. 2.

[5] *Report of the Examiner*, supra note 2, p. 2. For an insider's account on the sequence of events leading to the chapter 11 petition: Tibman, *The Murder of Lehman Brothers—An Insider's Look at the Global Meltdown* (Brick Tower Press, 2009), p. 177 et seq.

[6] Guerra/Johnston/Santos/Youssef, *Policies to Address Banking Sector Weaknesses: Evolution of Financial Markets and Institutional Indicators, International Monetary Fund*, IMF Staff Position Note (SPN/09/24), 7 October 2009; CESR, *The Lehman Brothers default*, supra note 1, p. 2. For a survey over the measures adopted by the Member States of the European Union see: Petrovic/Tutsch, *National Rescue Measures in Response to the Current Financial Crisis*, European Central Bank Legal Working Paper Series No. 8 July 2009.

[7] For a survey see: Standard & Poor's, *Ratings Direct, Credit FAQ: How Is the Lehman Brothers Holdings Inc. Bankruptcy Progressing* (1 October 2008), p. 2 (at: http://www2.standardandpoors.com/spf/pdf/media/Lehman_Bros_Bankruptcy.pdf).

nies" were finalised in an attempt to coordinate insolvency proceedings in various jurisdictions.[8] In July 2010, the US Dodd-Frank Wall Street Reform and Consumer Protection Act was signed into law.[9] Sec. 217 of this Act provides for a study on international cooperation relating to the resolution of systemic financial companies under the US Bankruptcy Code and applicable foreign law.[10]

A. The Business Model

LBHI pursued a business model which was not unique. At the time of Lehman's bankruptcy, major investment banks would follow a variation of the high-risk, high-leverage model, relying on the confidence of the counterparties to sustain.[11] Lehman's assets were predominantly long-term whereas its liabilities were largely short-term; hence the need

---

[8] Cross-Border Insolvency Protocol for the Lehman Brothers Group of Companies, at: *http://www. ekvandorne. com/files/crossborderprotocol. pdf*).

[9] One Hundred Eleventh Congress, Second Session, H. R. 4173; Remarks by the President at Signing of Dodd-Frank Wall Street Reform and Consumer Protection Act on 21 July 2010 (at: http://www. whitehouse. gov/the-press-office/remarks-president-signing-dodd-frank-wall-street-reform-and-consumer-protection-act).

[10] Sec. 217 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010:

"Study on International Coordination Relating to Bankruptcy Process for Non-bank Financial Institutions.

(a) Study.—

(1) In General.—The Board of Governors, in consultation with the Administrative Office of the United States Courts, shall conduct a study regarding international coordination relating to the resolution of systemic financial companies under the United States Bankruptcy Code and applicable foreign law.

(2) Issues to be Studied.—With respect to the bankruptcy process for financial companies, issues to be studied under this section include—

(A) the extent to which international coordination currently exists;

(B) current mechanisms and structures for facilitating international cooperation;

(C) barriers to effective international coordination; and

(D) ways to increase and make more effective international coordination of the resolution of financial companies, so as to minimize the impact on the financial system without creating moral hazard.

(b) Report to Congress.—Not later than 1 year after the date of enactment of this Act, the Administrative office of the United States Courts shall submit to the Committees on Banking, Housing, and Urban Affairs and the Judiciary of the Senate and the Committees on Financial Services and the Judiciary of the House of Representatives a report summarizing the results of the study conducted under subsection (a).

[11] *Report of the Examiner*, supra note 2, p. 3.

to borrow from counterparties to stay in business.[12] Thus, the LBHI group critically depended on market confidence. Due to Lehman's complex conglomerate structure a breakdown of investor confidence in one market segment would rapidly translate into financial problems of the whole group. The Lehman group was a multinational bank with many non-US subsidiaries integrated into a centralised cash-management system.[13] Once the cash-pooling mechanism broke down, the subsidiaries would rapidly experience severe liquidity problems.[14]

1. Prime Brokerage Services

As an investment bank Lehman did not take deposits. The Lehman group was active in offering prime brokerage services to hedge funds. Hedge funds lack back office functions, requiring a third party to deal with the trades and provide custodial services.[15] Thus, hedge funds would employ Lehman as an intermediary to access credit lines and major central securities depository systems.[16] In turn, Lehman required hedge funds to place collateral with them. LBHI's international conglomerate structure was determined by regulatory arbitrage. US hedge funds had exploited more lenient margin rules in the UK, when they channelled their business through Lehman's London subsidiary as their prime broker.[17] Once the Lehman conglomerate had broken down, hedge funds came to realise that they were relegated to the role of unse-

---

[12] *Report of the Examiner*, supra note 2, p. 3.

[13] See Registration Document of 30 August 2006 filed with the German Capital Market Authority BaFin by Lehman Brothers Securities N. V., incorporated in Curaçao, Netherlands Antilles (at: http://www.bafin.de/cln_179/nn_720794/SharedDocs/Downloads/DE/Verbraucher/Prospekte/Lehman_20Securities/Registrierungsformulare/Formular30082006, templateId = raw, property = publicationFile.pdf/Formular30082006.pdf); Walters, *Lehman Brothers and the British Eagle Principle*, 31 Comp. L. 65 (2010).

[14] Cf. Neue Zürcher Zeitung, NZZ Online, 8 July 2010, *Lehmans langes Begräbnis—Komplizierte Entflechtung der Tochtergesellschaften* (at: http://www.nzz.ch/finanzen/nachrichten/lehmans_langes_begraebnis_1.6472110.html).

[15] Re: Lehman Brothers International (Europe) (In Administration), [2009] EWCA 1161 (C.A. Civ.).

[16] Čihák/Nier, *The Need for Special Resolution Regimes for Financial Institutions—The Case of the European Union*, International Monetary Fund Working Paper No. WP/09/200 (September 2009), p. 4.

[17] Tung, *The Great Bailout of 2008—9*, 25 Emory Bankr. Dev. J. 333, 334 (2009). New Margin Requirements took effect in November 2009: Forex Capital Markets Ltd. (FXCM UK) (at: http://www.fxcm.co.uk/forex-margin.jsp).

cured creditors trying to get their collateral released from the London bankruptcy proceedings of the UK subsidiary.[18]

Although the UK Lehman subsidiary had handled transactions with a volume of billions of US dollars, the freezing of hedge fund assets does not appear to have triggered off bankruptcies.[19] Larger hedge funds had already diversified risk prior to the Lehman bankruptcy by abolishing single primer brokerage practices.[20] The London experience of US hedge funds did, however, give rise to concurrent bankruptcy proceedings begging the question to what extent US and English judges were prepared to apply notions of comity in private international law.[21]

2. Credit Default Swaps

Credit Default Swaps operate as highly sophisticated insurance mechanisms. Under a bilateral contract, the protection buyer undertakes to pay a premium (and/or an upfront payment) in exchange for a payment by the protection seller in the event of a credit default of a reference entity or a basket of reference entities.[22] Lehman's business with credit default swaps was considerable, both as counterparty and otherwise.[23] Nonetheless, the credit default swap branch did not generate much litigation.[24] Lehman's transactions were based on the 1992 Master Agreement prepared by the International Swaps and Derivatives As-

---

[18] Lubben, *The Bankruptcy Code Without Safe Harbours*, 84 Am. Bankr. L. J. 123, 126 (2010).

[19] Stapleton, *Systemic Financial Failure: Can We Stop the Risk?*, Aspatore February 2010, 1 (7), 2010 WL 562662.

[20] Cf. Shadab, *The Law and Economics of Hedge Funds: Financial Innovation and Investor Protection*, 6 Berkeley Bus. L. J. 240, 292 et seq. (2009); Thomas, *Private Investment Funds in Turbulent Times*, Aspatore April 2009, 1 (10), 2009 WL 1614254.

[21] *In re Lehman Brothers Holdings, Inc. v. BNY Corporate Trustee Services Ltd.*, 422 B. R. 407 (Bkrtcy). S. D. N. Y., 2010; *Perpetual Trustee Co. Ltd. v. BNY Corporate Trustee Services Ltd.*, [2009] EWHC 2953 (Ch.); cf. *Perpetual Trustee Co. Ltd. v. BNY Corporate Trustee Services Ltd.*, [2009] EWHC 1912 (Ch.), and Fleming, *After the storm*, 91 Europe. Lawyer 10 (2009), and infra, sub IV. 1.

[22] European Central Bank, *Credit Default Swaps and Counterparty Risks* (August 2009), p. 9 et seq.

[23] For an economic analysis of Lehman's credit default swap programme: Brigo/Morini/Patras, *Credit Calibration with Structural Models: The Lehman case and Equity Swaps under Counterparty Risk* (December 2009) (at: http://ssrn.com/abstract=1530742).

[24] Anderson/Hodges, *Credit Crisis Litigation: An Overview of Issues and Outcomes*, 28 Banking & Fin. Services Pol'y Rep. 1, 5 (2009).