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ZENTRUM FÜR EUROPÄISCHE RECHTSPOLITIK

Universität Bremen

ZERP

Ulf Uetzmann (Hrsg.)

**Glückwünsche von Schülern
zu Josef Falke's Geburtstag**

ZERP-Arbeitspapier 2/2015

IMPRESSUM

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Vorwort

Am 17.2.2014 feierte Josef Falke mit alten akademischen Weggefährten und jungen Fans seinen 65. Geburtstag im Rahmen eines Festakts an der Universität Bremen. Am 31.5.2014 beendete der Jubilar sodann den aktiven Dienst am Zentrum für Europäische Rechtspolitik (ZERP). Seine Verdienste sind bereits in einer Festgabe, einem ZERP-Diskussionspapier,¹ ausführlich gewürdigt.

Der Rahmen der Festgabe ließ es jedoch bedauerlicherweise nicht zu, alle interessierten Schüler von Josef Falke darin vollumfänglich zu Wort kommen zu lassen.² Daher war eine gesonderte Publikation dieser akademischen Glückwünsche ein schon im ZERP-Diskussionspapier erklärtes Ziel.³ Der Artikel von *Ulf Uetzmann* wurde bereits anderweitig veröffentlicht;⁴ für den Aufsatz von *Yuriy Fesh de Jour* soll dieses noch geschehen.⁵ Das vorliegende

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- 1 Christian Joerges/Tobias Pinkel/Ulf Uetzmann (Hg.), Josef Falke zum 65. Geburtstag, ZERP-Diskussionspapier 1/2014, Bremen 2014, zu finden unter: <<http://www.jura.uni-bremen.de/institute/zentrum-fuer-europaeische-rechtspolitik/publikationen/diskussionspapiere/?publ=2367>>.
 - 2 Das ZERP-Diskussionspapier 1/2014 (Fn. 1) enthält folgende (gemeinsame) Beiträge von Schülern von Josef Falke: Tobias Pinkel/Ulf Uetzmann, Josef Falke zur Beendigung des aktiven Dienstes am ZERP, 13-17; Olga Batura, Doktorvater Josef, 79-81; Haxhi Gashi, Prof. Dr. Josef Falke's contribution to legal science in Kosovo and Eastern Europe, 83-84; Christiane Gerstetter, Vom richtigen Dünge, 85-88; Zebiniso Khalilova, The candle, consuming itself to light the way for others, 89-92; Ayşil Canbay Schmidt, Prof. Josef Falke: Mein Doktorvater und der *spiritus Rector* des ZERP, 93-97; Felix Steengrafe, Die Erkundung der juristischen Landkarte, 99-101; Christoph Schewe, Das Recht von FTAs als Indikator für Vorherrschaft und Gestaltung des internationalen Handels?, 153-163.
 - 3 Vgl. nur Tobias Pinkel/Ulf Uetzmann, Josef Falke zur Beendigung des aktiven Dienstes am ZERP, in: ZERP-Diskussionspapier 1/2014 (Fn. 1), 16.
 - 4 Ulf Uetzmann, Einige Bemerkungen zum neuen Schema allgemeiner Zollpräferenzen der Europäischen Union, ZERP-Arbeitspapier 2/2014, Bremen, Juni 2014, zu finden unter: <<http://www.jura.uni-bremen.de/institute/zentrum-fuer-europaeische-rechtspolitik/publikationen/arbeitspapiere/?publ=2371&page=1>>. Siehe auch Ulf Uetzmann, Das neue allgemeine Zollpräferenzschema (GSP) der EU, *Hanse Law Review*, Jahrgang 10, 1. Ausgabe, Dezember 2014, 25-41, zu finden unter: <<http://www.hanselawreview.org/pdf14/Vol10No01Art02.pdf>>.
 - 5 Yuriy Fesh de Jour, Das Phänomen Organisierte Kriminalität in der Europäischen Union: Begriffliche Auseinandersetzung auf nationaler und europäischer Ebene. Siehe auch Yuriy Fesh de Jour, Das vielfältige Gesicht der organisierten Kriminalität: Ihre Organisationsformen und Strukturen am Beispiel chinesischer, japanischer und italienischer krimineller Organisationen, ZERP-Arbeitspapier 3/2014, Bremen,

ZERP-Arbeitspapier bündelt drei weitere Abhandlungen von Schülern und vervollkommnet so den Blick auf die intensive und umfassende individuelle Förderung des wissenschaftlichen Nachwuchses durch Josef Falke, die sich auf eine beeindruckende Bandbreite von Themen erstreckt.⁶

Ayşil Canbay Schmidt beschäftigt sich in ihrem Beitrag mit der Insolvenzverfahrensverordnung (EIR) der EU und den zugrundeliegenden grenzüberschreitenden Insolvenzen.⁷ Nach begrifflicher Definition von Insolvenz wird einführend die Kollektivverfahren erforderlicher Problematik geschildert. Hybridcharakter und nationale Verwurzelung des Insolvenzrechts machten die internationale Regulierung schwierig. Zwei theoretische extreme Ansätze hierzu, Territorialität-Pluralität und Universalität-Einheit, werden mit ihren Vor- und Nachteilen präsentiert und die kontextuelle Bedeutung politischer Erwägungen betont. Die EIR versuche sich zwar an einem Mittelweg: ein modifiziert universalistisches Modell werde jedoch strukturell sowie in EU- und nationalen Gerichtsentscheidungen territorial ausgestaltet. Der Folgeabschnitt zeichnet gründlich die vierzigjährige EIR-Genese nach. Unterschiedliche Schwerpunktsetzungen charakterisierten die jeweiligen Texte, hätten in der EIR Niederschlag gefunden und seien interpretativ zu berücksichtigen. Die nahezu unveränderte Umwandlung der 1995er-Konvention in das gemeinschaftliche Verordnungsinstrument wird begrüßt; neben der Wirkung und fehlenden Ratifikationsnotwendigkeit in den EU-Mitgliedstaaten wird die automatische EuGH-Zuständigkeit als Grund hierfür genannt. Sodann erfolgt eine intensive Diskussion möglicher Rechtsgrundlagen der EIR. Im Fokus steht nachfolgend als Herzstück der Verordnung die in Art. 3 EIR verankerte internationale Zuständigkeit; diese sei für die Bejahung der Zuständigkeit der Gerichte eines EU-Mitgliedstaats und für die Anerkennung eines ausländischen Insolvenzverfahrens bedeutsam. Angesichts fortbestehender Unterschiede nationalen Rechts entscheidungserheblich, bestimme die internationale Zuständigkeit sowohl die *lex fori* als auch die *lex fori concursus*. Die Anerkennung eines Insolvenzverfahrens als Ausprägung des Prinzips gegenseitigen Vertrauens hänge gem. Artt. 16 f. EIR von der Bejahung internationaler Zuständigkeit gem. Art. 3 EIR durch das erste Gericht ab. Auf Art. 3 EIR komme es auch wegen unzulässiger Zuständigkeitsvereinbarungen im (inter-)nationalen Insolvenz-

Oktober 2014, zu finden unter: <<http://www.jura.uni-bremen.de/institute/zentrum-fuer-europaeische-rechtspolitik/publikationen/arbeitspapiere/?publ=2438&page=1>>.

6 Vgl. hierzu nur die Liste der Erstbetreuungen von Promotionen durch Josef Falke im ZERP-Diskussionspapier 1/2014 (Fn. 1), 103-107.

7 In diesem ZERP-Arbeitspapier: Ayşil Canbay Schmidt, Regulating Cross-Border Insolvencies – The EIR and the Problem of Art. 3 on International Jurisdiction in Light of the Case Law of the ECJ considering the Proposal for a Regulation of the EP and of the Council amending the EIR.

recht an. Mit allem verknüpft sei also die Frage der allgemeinen EIR-Anwendbarkeit, die sich nach dem Mittelpunkt der hauptsächlichen Interessen (COMI) des Schuldners richte. Hier wird auf Interpretationsschwierigkeiten, Jurisdiktionskonflikte und Zeitverlust aufgrund vager und mehrdeutiger Formulierungen in Art. 3 EIR hingewiesen. Abschließend geht es um die aktuelle EIR-Revision. Die Triebkräfte werden ebenso aufgezählt wie rechtliche und empirische Studien erwähnt. Die darin identifizierten EIR-Hauptprobleme werden übersichtlich und knapp dargestellt. Selbiges gilt für die Ergebnisse der Öffentlichen Konsultation. Die Zusammenfassung des Kommissionsvorschlags ist wie folgt zu referieren: Beim Anwendungsbereich werde der Insolvenzverfahrensbegriff auf gerichtskontrollierte Verfahren erstreckt; vertrauliche nationale Verfahren könnten nach Notifizierung im Einzelfall durch Entscheidung der Kommission der EIR unterfallen. Bezüglich des COMI-Konzeptes werde die natürliche Person in den Blick genommen und die EuGH-Rechtsprechung umgesetzt. Umfangreiche Änderungen gestalteten das Recht der Sekundärinsolvenzverfahren praxisgerechter aus. EU-Insolvenzverfahren würden überdies an das Zeitalter elektronischer Kommunikation angepasst. Zuletzt konzentrierte sich der Vorschlag auf Unternehmensgruppen und stelle hierbei verschiedene prozedurale Koordinierungs- und Kooperationsinstrumente für eine erfolgreiche Restrukturierung aller Unternehmen zur Verfügung.

Haxhi Gashi präsentiert gestrafft Inhalt und Ergebnisse seiner Dissertation,⁸ die im Dezember 2011 an der Universität Bremen verteidigt wurde und im August 2013 bei Nomos erschienen ist.⁹ Der Autor lobt die bedeutsamen Beiträge seiner beiden Betreuer, Josef Falke und Christine Godt, für Abfassung und Veröffentlichung seiner Dissertation im Besonderen und die Entwicklung der Rechtswissenschaft in Osteuropa und im Kosovo im Allgemeinen. Die Dissertationseinleitung wird kurz beschrieben. Die Errichtung eines neuen Eigentumsregimes bei gleichzeitiger verfahrensmäßiger Achtung bestehender Eigentumsrechte forderte Eigentumstransformation und Privatisierungsprozess in den *post*-kommunistischen Staaten der 1990er Jahre mit Blick auf eine faire Balance heraus. Die Bedeutung internationaler und europäischer Standards sowie unterschiedliche Modelle und Verläufe werden konstatiert. In Fallstudien werden Recht und Praxis in sieben *post*-kommunistischen Staaten den

8 In diesem ZERP-Arbeitspapier: Haxhi Gashi, A contribution of Prof. Dr. Josef Falke for legal science in Kosovo and Eastern Europe – The example of the PhD Dissertation of Prof. Dr. iur. Haxhi Gashi (“A comparative analysis of the transformation of state/social property with a focus on privatization and restitution in post-communist countries: Kosovo as a sui generis case of privatization”).

9 Haxhi Gashi, A comparative analysis of the transformation of state/social property with a focus on privatization and restitution in post-communist countries: Kosovo as a sui generis case of privatization, Baden-Baden 2013: Nomos.

Entwicklungen im „Sonderfall“ Kosovo gegenübergestellt und hieraus Schlussfolgerungen gezogen. Hier können nur die konzis vorgestellten Ergebnisse der Dissertationskapitel referiert werden. Die defizitäre Erfüllung sozialer Forderungen mittels Staats- bzw. Sozialeigentums machte die Eigentums- transformation salonfähig; die Ressourcenumverteilung erforderte einen sozialen Konsens. Schaffung von Wettbewerbsfähigkeit und marktwirtschaftlicher Institutionen erwiesen sich als gleichermaßen notwendig. Als (kombinierbare) Methoden werden herausgearbeitet: die Insider-Privatisierung durch Aktien- ausgabe an Arbeitnehmer; die kostenlose Verteilung von Aktien und Unter- nehmenwerten an Volljährige; der Verkauf von Unternehmenswerten an ex- terne Investoren. Mangels internationaler Vorgabe sei das Spannungsverhältnis zwischen Restitution an die bisherigen Eigentümer und Wirtschaftsentwick- lung länderspezifisch aufgelöst worden. Straßburg habe Restitutionsklagen namentlich unter Verweis auf die „*margin of appreciation*-Doktrin“ abgewie- sen. Die Menschenrechtskommission der Vereinten Nationen habe in Fällen von Ausländerdiskriminierung durch „doppelte Standards“ auf Verletzung von Art. 26 IPBPR erkannt und eine gesetzlich abgesicherte Rückgabe oder Ent- schädigung eingefordert. Als Eigentum *sui generis* wird das im Kosovo zw- ischen 1945 und 1989 entstandene Sozialeigentum definiert; trotz Arbeitneh- merrechten hieran und an „*Socially Owned Enterprises*“ (SOEs) habe sich der Staat das entscheidende dritte Eigentumsrecht – *ius disponendi* – vorbehalten. Die Dissertation bezeichnet die Sozialeigentumsprivatisierung im Kosovo so- dann als eine *sui generis*, schildert die maßgeblichen Umstände und führt zu Vor- und Nachteilen aus. Alleinstellungsmerkmal des kosovarischen Privati- sierungsmodells sei der Verkauf schuldenfreier Unternehmenswerte an Invest- oren nach Auslagerung in Neufirmen (NewCos) gewesen. Die Lösung eigen- tumsbezogener Interessenkonflikte machte die Einrichtung einer kosovari- schen Spezialgerichtsbarkeit erforderlich; deren Entscheidungspraxis wird er- läutert. Der letzte Blick gilt Problemen bei der SOEs-Privatisierung; so befür- wortet der Autor etwa explizit Ausgleichsentschädigungen.

Das Thema von *Felix Steengrafe* ist die umstrittene Zulässigkeit einer Be- rücksichtigung „politischer Belange“ im Vergaberecht.¹⁰ Nach kursorischer Behandlung der Schlüsselbegriffe der Vergabe und „politischen Belange“ im öffentlichen Auftragswesen sowie der Vermittlung nötigen Hintergrundwis- sens zum *Government Procurement Agreement* (GPA), geht es ausführlich um dessen untersuchungsgegenstandsbezogene Vorgaben. Inländerprinzip und Meistbegünstigungsgrundsatz seien nicht verletzt, denn entsprechende Forde- rungen der Vergabestelle richteten sich an alle einheimischen und ausländi-

10 In diesem ZERP-Arbeitspapier: Felix Steengrafe, Die Zulässigkeit von „politischen Belangen“ im *Government Procurement Agreement* (GPA).

schen Bieter gleichermaßen. Im Rahmen der Bieterauswahl stehe zwar der eindeutige Wortlaut des Art. VIII lit. b) GPA der Geltendmachung „politischer Belange“ entgegen; in Anwendung der Voraussetzungen der „*ordre public*-Regel“ des Art. XXIII:2 GPA komme dies jedoch in Betracht. Der Ausnahmecharakter dieser Norm führe nicht zu einer grundsätzlichen Unzulässigkeit „politischer Belange“; deren fehlender *per se*-Verstoß gegen Regelungen des GPA, die übliche Instrumentalisierung öffentlicher Beschaffung und die explizite Anerkennung solcher Interessen in der ausgehandelten Neufassung des GPA sprächen eine dezidiert andere Sprache. Der Definition des Begriffs „öffentliche Ordnung“ in der Fn. zu Art. XIV lit. a) GATS sei vorsichtig auch für das GPA die Wertung zu entnehmen, dass von WTO-Regeln nur unter Berufung auf außergewöhnliche Argumente abgewichen werden dürfe. Hierfür stünden internationale Standards zum Umwelt- und Arbeitnehmerschutz oder nationale Gründe, wie verfassungsrechtlicher Schutz dieser Aspekte, eine Vielzahl von Gesetzen oder eine gefestigte höchstrichterliche Rechtsprechung, zur Verfügung. Bei Erteilung des Zuschlags an das „wirtschaftlich“ vorteilhafteste Angebot gem. Art. XIII:4 lit. b) GPA könnten „politische Belange“ wiederum berücksichtigt werden. Der Normwortlaut schließe dies nicht aus; zudem zeigten das europäische Vergaberecht, am Beispiel einer interpretierenden Kommissionsmitteilung, und das deutsche Kartellvergaberecht, in einer Gesamtschau der Vorschriften des § 97 Abs. 3 S. 1, Abs. 4 S. 2 und vor allem Abs. 5 GWB, dass der Begriff nicht rein wirtschaftlich auszulegen sei, sondern vielmehr zugleich eine Verfolgung „politischer Belange“ ermögliche. Parallel zur Argumentation bei Art. XXIII:2 GPA wiesen schließlich auch hier die einschlägige Instrumentalisierung in nationalen Rechtsordnungen und die explizite Normierung „politischer Belange“ in der ausgehandelten Neufassung des GPA, etwa in dessen Art. X:9 GPA, in diese Richtung.

Die mustergültige technische Betreuung dieses ZERP-Arbeitspapiers übernahm Antje Kautz, wofür ihr ganz besonders gedankt wird. Großer Dank gilt auch Jason Dinse für die hervorragende Unterstützung bei der Editierung der beiden englischsprachigen Beiträge.

Mit den besten Wünschen zum 65. Geburtstag und für die Zukunft: Auf dass sich „Doktorvater Josef“¹¹ an dieser wort- und tatkräftig zum Ausdruck kommenden besonderen Wertschätzung seiner Schüler erfreue!

Bremen, Dezember 2014

Ulf Uetzmann

11 Konzept und Institution werden plastisch beschrieben von Olga Batura, Doktorvater Josef, in: ZERP-Diskussionspapier 1/2014 (Fn. 1), 79-81.

Regulating Cross-Border Insolvencies

The EIR and the Problem of Art. 3 on International Jurisdiction in Light of the Case Law of the ECJ considering the Proposal for a Regulation of the EP and of the Council amending the EIR

AYŞIL CANBAY SCHMIDT

Introduction

The Council Regulation (EC) No 1346/2000 on insolvency proceedings ('European Insolvency Regulation', hereinafter EIR) entered into force on 31 May 2002 in all the Member States of the EU with the exception of Denmark and became directly applicable and binding in its entirety. The text of the Regulation is a product of the efforts to regulate cross-border insolvencies within Europe during more than four decades, and it is an interesting subject for researchers of European Law to observe the stages Europe has gone through in the years since the signing of the Treaty of Rome in 1957 between the then six Member States, namely Germany, Italy, France, Belgium, the Netherlands and Luxembourg, and the creation of the European Economic Community (EEC).

Insolvency is a universal economic fact of life common to all economies that regulate the interaction of economic subjects through markets.¹ It is deemed to be 'a specialized legal regime that may as well be contrasted with the non-payment of an individual debt: a general default'.² No matter what concept is used in order to define the act of bankruptcy, we all mean the same when we say that someone is bankrupt. 'We know it when we see it even without a precise definition'.³

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- 1 Insolvency is the term used for describing the default of business enterprises in the UK and the other common law countries, whereas bankruptcy refers to the term used as a legal response to defaults by either a natural person or a legal entity.
 - 2 *Jay Lawrence Westbrook*, *Multinational Enterprises in General Default*, 76 *American Bankruptcy Law Journal* 2002, pp. 1-41, p. 4.
 - 3 *Manfred Balz*, *The European Union Convention on Insolvency Proceedings*, 70 *American Bankruptcy Law Journal* 1996, pp. 485 ff.

It creates a situation which is defined as a ‘common pool problem’,⁴ which is often used to explain the need and the *raison d’être* of insolvency law. This refers to a situation which requires collective rather than individual action by the creditors with the help of a trustee or liquidator, in some cases through a court or some other public authority, namely the ‘creditors’ bargain theory’. The theory is based on the hypothetical argument of what creditors would agree upon if there were no insolvency rules providing for a collective insolvency. The answer to the question is: a collective procedure. In absence of a collective procedure, a free-for-all situation for all parties would exist that would lead to action in a self-interested manner. This would result in a ‘common pool problem’, which is exemplified by the situation in which fishing enterprises catch as many fish as possible to the extent that they would exhaust the resources. The ‘creditors’ bargain theory’ is a theory of how to tackle the ‘common pool problem’. The theory has been developed mainly by American scholars *Jackson* and *Baird*.⁵ According to the theory, in the case of a distressed debtor, as soon as the moment of insolvency arrives each creditor would try to have his claim satisfied before the others and seize the individual assets as soon as he can. In the absence of collective proceedings, this would lead to the destruction of a potentially viable business. The ‘going concern value’ would be lost. Insolvency law seeks to maximise the value of assets by coordinated procedures. Apart from the maximisation of the value of assets, there are two other reasons why the creditors would opt for collective proceedings. First, in the absence of a collective proceeding, each creditor would rush to the courts to seize as many assets as he can, which would result with a costly all-against-all litigation. Second, not to be left out in a battle of limited resources, the creditors would invest in mechanisms in order to monitor the debtor and act as soon as possible. An effective procedure would remove this incentive and the monitoring costs thereof.

Insolvency is linked closely with other branches of law such as tax law, real estate law, labour law, secured credit law etc. and consists of both substantive and procedural aspects, all of which gives insolvency law a hybrid character.

4 *Thomas H. Jackson*, *The Logic and Limits of Bankruptcy Law*, Cambridge, Mass. [et al.] 1986: Harvard University Press, p. 7.

5 See *Thomas H. Jackson*, *Bankruptcy, non-bankruptcy entitlements and the creditors’ bargain*, 91 *Yale Law Journal* 1982, pp. 862-863; *Douglas G. Baird/Thomas H. Jackson*, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 *University of Chicago Law Review* 1984, pp. 97-130; *Douglas G. Baird/Thomas H. Jackson*, *Fraudulent Conveyance Law and Its Proper Domain*, 38 *Vanderbilt Law Review* 1985, pp. 829-855.

Therefore, the concrete rules of insolvency law and the practice of insolvency are rooted deeply in national traditions of individual jurisdictions and have strong ties with the culture of the individual legal systems. This implies the fact that insolvencies are national in character and, therefore, poorly designed to deal with transnational or cross-border constellations. This feature of insolvency makes its regulation on an international basis difficult due to the variety of interests and policies concerned.

For a better understanding of cross-border insolvencies at a theoretical level and their regulation among various countries, two approaches have been called upon which are at the same time the extreme points on a spectrum, namely Territoriality-Plurality and Universality-Unity. Mostly, what is meant by one of these terms is somewhere between these extreme points.

Territoriality-Plurality and Universality-Unity

Territoriality in its simplest form refers to a system in which each country administers the assets within the country's own territory and recognises the other countries' rights to do the same. It is known as the 'grab rule', which is defined as dealing with the local assets for the satisfaction of the local creditors. The advantage of territoriality can be seen – from a local creditor's perspective – as the assets being held for the benefit of a smaller pool than might otherwise be the case. This would have a special advantage for protected categories of creditors such as employees. In a pure and strict manner it can be explained in three sentences: There are as many insolvency proceedings as there are States where the debtor has assets; for each set of proceedings the law in force in that State finds application; and only the creditors from that State in question are allowed take part in the proceedings.

Universality on the other hand can be described very briefly as: 'one court plays the tune and everyone else dances'.⁶ It implies that a single procedure is opened in the debtor's home country which encompasses all the assets of the debtor wherever located, a single national law is applied both to the substance and the procedure, all creditors no matter if national or foreign may participate in the proceedings, and the decisions made as a result are to be recognised and enforced in all the Member States.

6 *Lynn M. LoPucki*, Cooperation in International Bankruptcy: A Post-Universalist Approach, 84 Cornell Law Review 1999, pp. 696-762, p. 699.

Both models can be modified and moved towards intermediate models.⁷ In the literature there are scholars who are for a territorialist approach whereas some argue for a universalist approach, and there are some proposing the intermediate models or even an alternative approach apart from the ideal models.⁸ *Westbrook* advocates a position of modified universality and sees it as a transitional regime that would lead someday to pure ‘universality’ when the conditions are mature. In her view *LoPucki* wishes to avoid jurisdictional competition and forum shopping and views cooperative territoriality as a concession to globalization.

During these theoretical debates the question is not posed when universalism and harmonization are desirable and when territorialism and non-uniformity should govern. I would like to highlight the fact that there are certain policy considerations underlying these approaches that are determinative. For instance from the point of view of the creditors, the sophisticated creditors are regarded to be in a better position to assess the associated risks while entering into an agreement with a foreign firm, whereas the unsophisticated creditors – such as employees, small suppliers etc. – may not be able to adjust themselves in such cases. This situation may result in the low-risk debtors being driven out of the market as they would be able to borrow less. The debtors may also act strategically, and in a universalistic system they may intend to protect their interests and engage in forum shopping to opt for a forum more favourable to them. The possibility of opening territorial proceedings is claimed to be a kind of insurance in such cases. Various examples can be given to support the advantages of territoriality under certain circumstances and in different constellations. However, one should not disregard the deficiencies emerging from territoriality, especially taking into account the fact that the determinative point is the place where the debtor’s assets are located. This puts the creditor in great difficulty in predicting the distribution of assets, which leads to an increase in the price of credit due to the uncertainty. It may tempt the debtor to act strategically such as transferring the assets from one country to another or, on the contrary, close an establishment that could constitute grounds for jurisdiction. The costs would increase due to the plurality of the proceedings where the debtor has establishments. It could also obstruct reorganization and rescue processes.

7 *Miguel Virgós Soriano/Francisco J. Garcimartín Alférez*, *The European Insolvency Regulation: Law and Practice*, The Hague [*et al.*] 2004: Kluwer Law International, pp. 10-15.

8 *LoPucki*, (Fn. 6), pp. 720-753; *Robert K. Rasmussen*, *A new Approach to Transnational Insolvencies*, 19 *Michigan Journal of International Law* 1997-1998, pp. 1-36; *Jay Lawrence Westbrook*, *Theory and Pragmatism In Global Insolvencies: Choice of Law and Choice of Forum*, 65 *American Bankruptcy Law Journal* 1991, pp. 457-490, p. 459.

Just like the territorial model, the universal model may have its advantages as well. In this case, the process would be centralised and the applicable law would be predictable. Forum shopping would be irrelevant. It would result in a more efficient process, and the additional administrative costs would be avoided. A universalist approach may enable a successful rescue keeping the company integrated and increase its value when sold as a whole. Apart from reducing uncertainty and strategic behaviour, the cost of credit would be reduced. It would also avoid a rush to the courts for opening insolvency proceedings in case there is a possibility of moving the assets to another State, as the location of the assets would not play any role.

According to some academics, when territoriality and universality are analysed systematically, it is seen that territoriality leads to a distortion of the capital allocation decision. So far, the debate on international bankruptcies focuses mostly on the *ex post* impact of the ‘grab rule’ on local creditors, and the *ex ante* perspective has been missing.

In addition to the often discussed costs of uncertainty and multiple adjudications, a rule that systematically favours some creditors over others *ex post* can lead to inefficient investment.

Rules designed to protect the interests of local creditors in the adjudication of bankruptcies may have harmful results on the allocation of capital across countries by causing suboptimal investment by multinational firms. Because territorial rules make the outcome of the bankruptcy from the point of view of a creditor depend on the distribution of debt and assets across countries, the interest rate demanded by creditors in exchange for loans will depend on that distribution. That would make some difference between the old and the new creditors and firms will choose not to invest in a country offering the greatest return on investment, accepting instead a lower return in exchange for a lower interest rate on loans. ‘This strategic investment will generate a deadweight loss for society’.⁹

The universalist approach has its disadvantages in cases where the opening of a territorial proceeding would be more efficient in organizational terms. This approach requires inter-state cooperation, which in some cases may not be that easy. States may hardly sacrifice the local creditors when they are not sure that they would receive the similar action from the other States.

The difficulty of the Regulation lies in the fact that it has the objective to find a kind of balanced solution for obtaining a consensus between these two approaches, taking into account the diversities between the national laws of the

9 Lucian Arye Bebchuk/Andrew T. Guzman, An Economic Analysis of Transnational Bankruptcies, 42 Journal of Law and Economics 1999, pp. 775-809.

Member States while drafting a text that is acceptable to all the Member States.

Although the model foreseen for the Regulation is modified universality – which sounds like the universalist approach – it is dominant over the territorialist one. The structure of the Regulation and the decisions taken by the ECJ or the national courts of the Member States reflect a very different view: the triumph of the territorial approach at the end of the day.¹⁰

The Genesis of the EIR

The EIR entered into force in all Member States of the EU, with the exception of Denmark, on 31 May 2002 and became ‘binding in its entirety’ and ‘directly applicable’ in the Member States in accordance with the Treaty establishing the European Community (hereinafter EC). It took almost forty years to achieve a ‘European’ instrument to regulate cross-border insolvencies within Europe. It is interesting to take a look at the background of the EIR, as it has a rich history containing elements from each stage through which the EU has gone. The background of the EIR, the parallel developments taking place such as the enlargement processes, changing tendencies regarding insolvency law and the reflections of these developments on the texts adopted are very helpful while interpreting the various articles of the Regulation apart from the significance of the case law of the Court of Justice of the European Union (ECJ). Until the adoption of the final text as the Regulation, several texts on insolvency have been drafted, each reflecting a divergent emphasis. For instance, whereas some of the texts dealt with insolvency as a main theme, the others dealt with insolvency issues only in an ancillary way. The purposes of the texts varied depending on the strategies pursued, that is, whether the agenda has been for approximation, convergence or harmonization of laws.

The first emergence of the instrument to regulate cross-border insolvencies had been as a private international law initiative based on Art. 220 Treaty of Rome.¹¹

10 *Gabriel Moss*, Group Insolvency – Choice of Forum and Law: The European Experience under the Influence of English Pragmatism, 32 *Brooklyn Journal of International Law* 2007, pp. 1005-1018, p. 1008.

11 The Article has been repealed by the entry into force of the Treaty of Lisbon on 1 December 2009. The fourth indent of the Article was as follows: ‘The Member States shall, so far as necessary, enter into negotiations with each other with a view to securing for the benefits of their nationals: [...] - the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards’.

It started with the Committee of Experts, formed in July 1960 in order to fulfil the obligations imposed by Art. 220 Treaty of Rome, which took a decision regarding insolvency (and related matters) as a separate subject requiring special treatment. After this decision the Committee continued to prepare its work, which has become the Brussels Convention of 27 September 1968 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (now Brussels I Regulation 44/2001). Art. 1(2) Brussels Convention expressly precluded insolvency and related matters from its scope of application. Another group of experts drawn from the six Member States were called up to work on a separate legal framework, namely a Bankruptcy Convention, which would complement the Brussels Convention and at the same time accomplish the task mentioned in Art. 220 Treaty of Rome. Although Art. 220 Treaty of Rome did not mention explicitly the form of the instrument, it had been interpreted already in the early times so as to require the conclusion of texts in the convention form. This brought some disadvantages as well; due to the conceptual and practical differences, an agreement on the text required to come to compromises which weakened the final text. The innovative approach embodied in the Brussels Convention of imposing rules of direct jurisdiction in place of individual rules applied by the Member States was also followed in the texts of the Drafts from both 1970 (Title II Art. 3-17) and 1980 (Title II Art. 3-16), and thus it was conceived as a direct or double convention.

By imposing a uniform code of rules for the exercise of jurisdiction in international cases, the conventions would enable the recognition and enforcement of judgments to become automatic processes with minimal scope allowed for parties to challenge or resist at the stage of enforcement. The courts and the officials of the Member States would be obliged to give ‘full faith and credit’ to the legal determinations of the others.¹²

This model Bankruptcy Convention was already a courageous design, as it compelled the interested parties to rely on the integrity of the legal process at the place where jurisdiction is first exercised. This requires diligent drafting of the rules on allocation of jurisdiction so that their effects and meaning are clear to the parties for them to understand well their legal position and enable them to arrange their affairs with more certainty. But both texts lack the required exactness in this sense.

For the determination of the jurisdictional criteria, three cases were foreseen:

In the first case, referral was made to the Contracting State in which the debtor’s centre of administration was situated and the courts of that State were in a position to declare exclusive jurisdiction regarding the bankruptcy of the debtor.

12 ‘Mutual Trust’ was the key word underlying the system.

The second case applied to situations where the debtor's centre of administration was not found in any of the Contracting States. The Contracting State in which the debtor had an establishment would have jurisdiction to declare the debtor bankrupt.

In the third case, where the debtor had neither his centre of administration nor an establishment located in a Contracting State, a kind of 'open season' was declared by authorizing the courts of any Contracting State whose law permitted to declare the debtor bankrupt. The bankruptcies realised according to the last case would have enjoyed recognition and enforcement throughout the Community in the Draft from 1970, but the text from 1980 was formulated in a manner to leave such bankruptcies outside the scope of the Convention (Arts. 5 1970 and 1980 Drafts, respectively).¹³

Even the modified text of 1980 contained ambiguities and uncertainties in sense of jurisdictional criteria. The main criterion mentioned above – the centre of administration of the debtor – could itself cause problems related to the divergences in the approaches to be adopted while applying the concept to the facts of the actual cases. Although both texts contain a definition of the concept as meaning 'the place where the debtor usually administers his main interests', even this definition was capable of giving rise to more problems, especially due to the presumption and how it would be rebutted and the degree of proof required etc.

Similarly, in the second case mentioned above, one could come across problems in interpreting the concept 'establishment' as a criterion to establish jurisdiction. The Draft from 1970 did not have any definition, and the 1980 Draft had one in Art. 4(2), being insufficient: 'An establishment exists in a place where an activity of the debtor comprising a series of transactions is carried on by him or on his behalf'.

This could result in the courts of several Contracting States having concurrent jurisdiction. The priority issue should be carefully designed to achieve a fair and efficient solution, but unfortunately, this was not the case. Instead of a qualitative test to determine the appropriate forum, a Community-wide supremacy was awarded to the proceedings which were chronologically the first to be opened (Arts. 15(2), 52(1) 1970 Draft and Arts. 13(2), 58(1) 1980 Draft).

The Committee of Experts called up by the Council in 1989 to relaunch a Project for a Bankruptcy Convention adopted an eclectic approach and tried to

13 This was done probably to duplicate the effect of Art. 4 Brussels Convention 1968, which let the courts of the Contracting States make use of the domestic rules on jurisdiction including the ones of exorbitant nature and which has been harshly criticised in the literature. See *Kurt Nadelmann*, 67 *Columbia Law Review* 1967, p. 995.

bring together the satisfactory elements of the Draft Convention of 1980 and the Istanbul Convention of 1990 and combine these elements with some fresh ones. After the experiences gained through these Conventions, a ‘workable’ set of rules was to be achieved. The text was produced by the *Balz* Committee and had the potential to be implemented in all the Member States under normal circumstances if it had not been aborted due to some conflicts within the Member States at that time.¹⁴

The Convention of 1995 was also a direct or double convention like its predecessors, the effect of which was to impose a uniform set of jurisdictional rules to be applied in all the Contracting States in cases falling within its scope. It consisted of 55 Articles, six Chapters and 3 Annexes. It had a more realistic approach, taking into account the divergence of the substantive laws of the Member States with regard to credit, security and insolvency matters.

It laid the basic rules for jurisdiction and choice of law and also addressed the practical concerns of the liquidator with provisions for recognition of the proceedings and the exercise of the liquidator’s powers in other Contracting States. The concerns of the creditors were taken into account by simplification of the procedures for proving their claims. The special facility was to enable secondary proceedings to be opened by certain types of creditors with effects restricted to the territory of a single Contracting State.

The Convention was accompanied by a Report, which is still consulted by the ECJ, legal scholars and insolvency practitioners while interpreting the provisions of the EIR. However, its legal position to the EIR is not very clear.¹⁵ Lastly, in order to achieve an autonomous interpretation and a uniform application of the Convention, a chapter was added to establish the jurisdiction of the ECJ for delivering rulings concerning the Convention and its Annexes.

This last Convention was not, however, destined to oblivion like its predecessors but was resurrected as a Regulation¹⁶ some years after. The text of the Convention was simply transformed into a Regulation, and it mainly remained substantially the same, except for some provisions. An amendment was made to Art. 5 concerning the definition of ‘rights in rem’ by inserting additional wording for the ‘rights in rem’ to include a security effected in relation to

14 The relations between the UK and the other Member States were seriously distorted due to the crisis in British beef and dairy industry occasioned by the BSE epidemic, and another impediment that came out was the controversy between the UK and Spain concerning sovereignty over Gibraltar.

15 The *Virgós/Schmit* Report on the Convention on Insolvency Proceedings, dated 1996.

16 Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L 160, 30.6.2000, pp. 1-18.

‘both specific assets and collections of indefinite assets as a whole which change from time to time’. The proposal for the amendment was made by the UK for the provision to be applicable also for ‘floating charges’ and also for the fixed charges granted over future assets and receivables. Another amendment proposal had come from Belgium with regard to Art. 42 in order to accommodate the fact that the State has two official languages and both may be used in legal communication or for the purpose of filing claims.¹⁷

After the attempts made over forty years, the shift of form from convention to a Community instrument (Regulation) proved to be necessary for practical reasons – but not unproblematic. First of all, I would like to mention the advantages the shift in the instrument has brought about. At the beginning, as the first attempts for a Bankruptcy Convention were made, the EU had only six Member States, and the number of Member States was certain to increase. A convention would have been more complicated, as Conventions require a ratification procedure that would make it even harder for a EU of, at that time, 15 States to complete the constitutional procedures. The whole process would be lengthy and would take perhaps as much as a decade. Conversely, a Regulation governed by the provisions of the EC (Art. 249) is binding in its entirety and enjoys direct applicability in all Member States. A Regulation does not require an additional implementation procedure in the Member State as in case of a Directive.

The second advantage is that the Regulation did not require an additional chapter for maintaining the jurisdiction of the ECJ as in case of the 1995 Convention. The required uniformity of effect for the Regulation is assured through the interpretative jurisdiction of the ECJ acting under Art. 267 of the Treaty on the Functioning of the European Union (hereinafter TFEU) (Art. 234 EC). As a Community instrument, the Regulation would take precedence over any conflicting provisions of national laws or administrative practice under the doctrine developed by the jurisprudence of the ECJ.¹⁸

17 Gabriel S. Moss/Ian F. Fletcher/Stuart Isaacs (eds.), *The EC Regulation on insolvency proceedings: A commentary and annotated guide*, Oxford [*et al.*] 2002: Oxford University Press, p. 354.

18 Leading cases establishing the doctrine of supremacy are as follows: European Court of Justice (ECJ) Case 26/62, *N.V. Algemene Transport- en Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen*, J. of 5.2.1963; ECJ Case 6/64, *Flaminio Costa v. ENEL*, J. of 15.7.1964; ECJ Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, J. of 9.3.1978, E.C.R. 1978, 630-646; ECJ Case 213/89, *The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd. and Others*, J. of 19.6.1990, E.C.R. 1990, I-2466-2475.

Legal Basis for Adopting the EIR

As mentioned above, the instrument Regulation brings about certain advantages but problems as well – especially regarding the legal basis underlying the Regulation – and raises a problem of Community law.¹⁹ The Preamble of the Regulation explicitly mentions that the Regulation was enacted having regard to the EC and especially Arts. 61(c) (Art. 67 TFEU) and 67(1) (repealed by the Treaty of Lisbon), as well as having regard to the initiatives of the Federal Republic of Germany and the Republic of Finland.

The Treaty of Rome had hardly taken account of a legal framework of business transactions and did not naturally provide for the harmonisation of contract or private international law. Art. 220 Treaty of Rome made clear with its restrictive wording ‘so far as is necessary’²⁰ that harmonization or unification of the conflicts law was left to the intergovernmental negotiations of the Member States. This view was reflected also in the Brussels and Lugano Conventions, the texts of which were identically formulated, as was the Rome Convention, as well. The Treaty of Amsterdam brought about considerable modifications to conflicts of laws within the European Community.²¹

The Treaty of Maastricht was the first attempt to create legislative structures at a European level for matters relating to ‘Justice and Home Affairs’, the so-called ‘third-pillar’ of the EU. ‘Judicial Cooperation in Civil Matters’ was mentioned among other subjects, but it was not yet clear what was meant by ‘cooperation’ exactly, and the instrument for achieving the scope was also not available. The Treaty of Amsterdam shifted the responsibility for legislation concerning the judicial cooperation in civil matters from the third pillar of the EU to the first pillar. Title IV on ‘Visas, asylum, immigration and other policies related to free movement of persons’ contains some complicated provisions on future Community action in this field, and according to Art. 61(c) EC

19 *Jona Israël* discusses this matter in his book (European Cross Border Insolvency Regulation: A Critical Appraisal of Council Regulation 1346/2000 on Insolvency Proceedings in the Light of a Paradigm of Cooperation and a *Comitas Europaea*, Antwerpen [*et al.*] 2005: Intersentia) and comes to the conclusion that an attempt to challenge the validity of the Council Regulation (EC) No 1346/2000 could be successful: See further pp. 244-252.

20 Art. 293 charges the Member States: ‘[...] so far as is necessary to enter into negotiations with each other with a view to securing for the benefit of their nationals [...] simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts and tribunals and of arbitral awards [...]’.

21 *Jan Hendrik Dalhuisen*, *Dalhuisen on International Commercial, Financial and Trade Law*, 2. ed., Oxford [*et al.*] 2004: Hart Publishing, pp. 1028-1041.

(Art. 67 TFEU), the Council shall adopt measures in the field of judicial cooperation in civil matters as provided for in Art. 65 EC (Art. 81 TFEU).

Also, Art. 67 EC (repealed by the Treaty of Lisbon) provides for a special legislative procedure to be followed by the Community institutions in this field. The reluctance and resistance of the Member States in the transfer of legislative competence to the Community could only be overcome by a special procedure. According to this procedure, during the first five years the right of the legislative initiative would lie with both the Community and each Member State, and the Council would only be able to act unanimously, which allowed each Member State to veto a decision. The position of the European Parliament was limited to a right of consultation.²²

The position of some Member States was also problematic with regard to Title IV, as Denmark, Ireland and the UK declared that they would not participate in the adoption of the relevant measures. Art. 69 EC (repealed by the Treaty of Lisbon) refers to the two protocols to the Treaty of Amsterdam that were issued: one for the case of Denmark and the other for the case of Ireland and the UK. The UK and Ireland should be mentioned separately, as the protocol concerning these States did contain an opt-in clause for the adoption of a certain measure, whereas the protocol for Denmark did not contain any opt-in but an escape clause regulated in the Art. 7, which permits Denmark to issue a waiver with a condition that it has to apply all relevant measures at the time of the issuance of the waiver. However, Denmark has not yet shown any consent regarding its participation in the judicial cooperation in civil matters.

The Community has been active in the field of conflicts legislation for many years, and many of the rules have been enacted on the basis of Art. 95 EC (Art. 115 TFEU). Art. 65 EC (Art. 81 TFEU) and Art. 95 EC (Art. 115 TFEU) overlap with regard to the proper functioning of the internal market. Measures necessary for the proper functioning of the internal market within the meaning of Art. 65 EC (Art. 81 TFEU) will of course have as their object the establishment and functioning of the internal market within the meaning of Art. 95(1) EC (Art. 115 TFEU). Therefore, the Treaty of Amsterdam can only be said to have established a new competence of the Community for conflicts regulation insofar as Art. 95 EC (Art. 115 TFEU) is inapplicable under its own para. 2. This regards in particular the provisions relating to the free movement of persons and to the rights and interests of employed persons. Since the provisions of Title IV are meant to support *inter alia* the free movement of persons, then Art. 61 EC (Art. 67 TFEU) and 65 EC (Art. 81 TFEU) can be interpreted as a legislative basis supplementing Art. 95 EC (Art. 115 TFEU) with regard to

22 This enabled the right of initiative of Germany and Finland for enacting the Council Regulation (EC) No 1346/2000.

free movement of persons, including legal persons, companies etc. However, in case of a contract, tort or restitution, the impact on the free movement of goods and services would be clearer, and these acts would thus fall within the scope of Art. 95 EC (Art. 115 TFEU).

In cases in which Community conflicts legislation is meant to remove obstacles to both the free movement of persons and free movement of goods and services, there is a potential conflict between Arts. 61 EC (Art. 67 TFEU), 65 EC (Art. 81 TFEU) and 95 EC (Art. 115 TFEU). In similar situations the ECJ gave priority to Art. 95 EC (Art. 115 TFEU), due to the more effective participation of the European Parliament, as it is supposed to reflect a basic democratic principle.²³

Basedow points out to the extremely limited rights of the European Parliament under Art. 67 EC (repealed by the Treaty of Lisbon) within the first five years and claims that the tasks mentioned in the Action Plan from December 1998 would have to be realised to a large extent on the basis of Art. 95 EC (Art. 115 TFEU). Therefore, whereas Art. 61 EC (Art. 67 TFEU) was the proper legal basis for the Brussels II Regulation, Art. 95 EC (Art. 115 TFEU) should have been chosen as the legal basis for Brussels I Regulation.

It can also be disputed whether Art. 61 EC (Art. 67 TFEU) and 65 EC (Art. 81 TFEU) provide the appropriate legal basis for the Insolvency Regulation, as cross-border insolvency issues do not only fall within the ambit of free movement of goods, but they are also closely related to the free movement of goods and services and capital.

The Core of the EIR: Art. 3 regulating International Jurisdiction

The rules of international jurisdiction determine whether the courts of a certain country have jurisdiction for deciding cases having a foreign element. Contrary to territorial or substantive jurisdiction, courts of a country as a whole have jurisdiction, not a certain court.

The acceptance and significance of international jurisdiction has increased in the last decades proportional to the increase in cross-border legal relations and transactions in several areas of law. Within the scope of the EIR, international jurisdiction gains, in principle, in two aspects significance. On the one

23 *Jürgen Basedow*, *The Communitarization of the Conflict of Laws under the Treaty of Amsterdam*, 37 *Common Market Law Review* 2000, pp. 687-708, p. 698, where he mentions the case ECJ C-300/89, *Commission of the European Communities v. Council of the European Communities*, J. of 11.6.1991, E.C.R. 1991, I-2895-2902.

hand, it regulates direct international jurisdiction, *i.e.* whether an insolvency proceeding can be initiated before the courts of a certain Member State. On the other hand, it plays an important role in the area of recognition of foreign insolvency proceedings.

The question of applicability of the international insolvency rules is often combined with the jurisdictional criteria. It is also not explicitly regulated within the EIR, but it was included in the provisions regulating international jurisdiction. The EIR is only applicable when the debtor has his centre of main interests in a Member State. Due to this reason, the interpretation and the boundaries of the concept establishing international jurisdiction is of great significance especially in the general applicability of the EIR.²⁴

In any insolvency proceeding, the first problem to be solved and the first question to be answered is jurisdiction, both by the party filing and by the court before which the application is filed. Rules of international jurisdiction determine in which country an insolvency proceeding can be initiated. It is basically connected with the question in which country the applicant can file his application for the opening of the insolvency proceedings. Apart from the applicant, the creditors must also take the necessary measures for filing their claims in the foreign country, for instance to provide for the indispensable translations, to appoint a legal counsel etc.

International jurisdiction for opening the insolvency proceedings is determinative for the establishment of jurisdiction, for conducting proceedings and, in some cases, for ruling on matters that are closely related to insolvency. The court referred to applies its own law to the whole procedure, namely the *lex fori*. The international jurisdiction determines which national law of procedure and practices are applicable for the case. Especially the rules for taking evidence play an important role in practice as they differ from Member State to Member State. The most remarkable differences emerge from the divergences between English common law and continental civil law systems.

24 See the landmark cases that came before the ECJ for preliminary ruling since the entry into force of the EIR regarding Art. 3: ECJ Case C-1/04, *Susanne Staubitz-Schreiber*, J. of 17.1.2006, E.C.R. 2006, I-719-730; ECJ Case C-341/04, *Eurofood IFSC Ltd*, J. of 2.5.2006, E.C.R. 2006, I-3854-3880; ECJ Case C-339/07, *Christopher Seagon v. Deko Marty Belgium NV*, J. of 12.2.2009, E.C.R. 2009, I-767 ff.; ECJ Case C-444/07, *MG Probud Gdynia sp. z o.o.*, J. of 21.1.2010, E.C.R. 2010, I-417 ff.; ECJ Case C-396/09, *Interedil Srl, in liquidation v. Fallimento Interedil Srl, Intesa Gestione Crediti SpA*, J. of 20.10.2011, E.C.R. 2011, I-9939-9962; ECJ Case C-191/10, *Rastelli Davide e C. Snc v. Jean-Charles Hidoux*, J. of 15.12.2011, E.C.R. 2011, I-13211-13225; ECJ Case C-116/11, *Bank Handlowy w Warszawie SA, PPHU 'ADAX'/Ryszard Adamiak v. Christianapol sp. z o.o.*, J. of 22.11.2012, nyr; ECJ Case C-461/11, *Ulf Kazimierz Radziejewski v. Kronofogdemyndigheten i Stockholm*, J. of 8.11.2012, nyr.

A characteristic of international insolvency law is that international jurisdiction determines not only the law of procedure to be applied but the substantive law as well. In principle, for the insolvency proceedings, the substantive law of the country where insolvency proceedings are initiated, the *lex fori concursus*, is applicable. As a consequence of this, international jurisdiction actually determines to a large extent the substantive law to be applied to the insolvency proceedings. A very important point for all the concerned parties to know is which law would be applicable in case of insolvency.

If the laws of the Member States of the EU were harmonised to the extent that there are almost no divergences among the national laws of the Member States regarding insolvency law, this aspect of the EIR could be omitted. However, for the moment and for the foreseeable future, such a possibility remains out of the question. On the contrary, it is precisely in this area that the differences among the national laws of the Member States are so great, for instance regarding the requirements for opening insolvency proceedings, the regulation of avoidance actions, rights of the secured creditors etc. In order to provide for the equal treatment of creditors and to avoid forum shopping and unforeseeable developments, the approximation of the national laws of the Member States should be achieved. As long as this is not done, this rule of international jurisdiction will continue to be of crucial importance for the creditors as well as for the debtors. Considering the significance of international jurisdiction in determining the procedural and substantive law to be applied to a case and on the *ex ante* and *ex post* behaviours of the parties concerned, this rule constitutes, in my opinion, the core of any regulation in the area of international insolvency law and also the EIR as well.

The recognition of a foreign insolvency proceeding presupposes the (direct-indirect) international jurisdiction of the first court. Within the scope of the EIR, the decision of the first court regarding its international jurisdiction cannot be challenged in conformity with the ‘principle of mutual trust’.²⁵ This principle may be subject to lengthy discussions regarding the concept itself and its interpretation by the ECJ. When the first court has confirmed its jurisdiction, then the decision opening the insolvency proceedings has to be recognised automatically

25 This principle may be subject to lengthy discussions regarding the concept itself and its interpretation by the ECJ. Although the very nature of ‘trust’ requires to be confirmed in an ongoing process, the ECJ seems to overlook this point by employing it as a rather static concept. ‘Trust’ is essential in the context of the EU and its law as it tackles the complexity and sophistication of the modern systems, it is the lubricant of a modern society: See *Niklas Luhmann* in his book (Vertrauen: Ein Mechanismus der Reduktion sozialer Komplexität, Stuttgart 1968: Enke) elaborates on the subject as well as the economist *Kenneth Joseph Arrow* (The limits of organization, New York, NY [*et al.*] 1974: Norton, p. 23, p. 26).

without any other formality in all the Member States, according to the Art. 16 f EIR. However, it should be borne in mind that the first court declaring its international jurisdiction must have relied on the conditions laid out in Art. 3 EIR in order to make use of the automatic recognition. Types of proceedings that are conducted in a Member State but do not fall in the scope of the EIR do not enjoy automatic recognition under the EIR. Due to these reasons, the rules of the EIR regarding international jurisdiction gain more significance especially in the area of recognition of foreign proceedings. An insolvency proceeding receives Union-wide recognition and effect only if the international jurisdiction of the court is established according to the Art. 3 EIR.

Within the EIR, the court addressed must take into account the connecting factors in Art. 3 for establishing jurisdiction. More concretely, it has to examine whether the debtor has its 'Centre of Main Interests' (COMI) or an establishment in the Member State opening the insolvency proceedings. Only after having examined and found out about these factors may the court decide whether to open main, secondary or territorial proceedings.

Although jurisdiction agreements are very popular in international legal relations, national and international insolvency law is not an area where jurisdiction agreements are permitted. This may be explained based on the fact that not all the creditors can consent to such agreement before the occurrence of insolvency and a jurisdiction agreement requires the consent of all the parties to it in principle. There exists no person or authority that would represent the creditors as a whole. Due to this, an agreement which would be binding upon the creditors who are parties to it would hamper the uniformity of the insolvency proceeding and would lead to manipulations of jurisdiction in favour of some at the price of the others.²⁶

At the moment, there is no possibility of a jurisdiction agreement in the area of insolvency law, and this fact increases the significance of the rules on international jurisdiction. Without exception, all of the insolvency proceedings that fall within the scope of the EIR have to be opened and conducted at the place stipulated in Art. 3 EIR.

Art. 3 EIR on international jurisdiction plays a very important role with regard to groups of companies as well as the relation of the EIR as a secondary law instrument to primary law of the EU and the freedoms of the internal mar-

26 There are, however, opinions among legal scholars in favour of jurisdiction agreements and even arbitration in cross-border insolvency matters: See *Rasmussen*, (Fn. 8); *Allan L. Gropper*, *The Arbitration of Cross-Border Insolvencies*, 86 *American Bankruptcy Law Journal* 2012, pp. 201-242.

ket, especially to the freedom of establishment.²⁷

The EIR has often been criticised in the legal literature and by insolvency practitioners due to the ‘vague’ and ‘ambiguous’ drafting of the Art. 3 and its ‘Centre of Main Interests’ (COMI) concept, which gave rise to several jurisdictional conflicts and problems of interpretation by the courts of the Member States. Considering how valuable and crucial time may be with regard to insolvency proceedings, especially when the rescue of a company is at stake, the importance of avoiding such conflicts can be easily grasped.

The EIR in Construction

The EIR in its Art. 46 concludes as follows:

‘No later than 1 June 2012, and every five years thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation. The report shall be accompanied if need be by a proposal for adaptation of this Regulation’.

This provision makes sense as it has been more than ten years since the adoption of the EIR. There have been several important developments since then: tendencies have shifted, giving more weight to the rescue of viable companies; after the failure of the Constitutional Treaty, the Treaty of Lisbon entered into force, which has brought many amendments regarding the law of the EU; several countries in the world, including some Member States of the EU, were affected by the financial crisis; some Member States modernised their insolvency laws following the new tendencies etc. The EIR could not be left outside of these developments. As a result, there have been legal and empirical studies done in the last years. Academics, insolvency practitioners, judges, liquidators, institutions – like INSOL – have been consulted in all the Member States. This has resulted in an external evaluation of the EIR with the cooperation of the Universities of Heidelberg and Vienna with the participation of leading aca-

27 See the case law of the ECJ on the subject: ECJ Case C-212/97, *Centros Ltd v. Erhvervs-og Selskabsstyrelsen*, J. of 9.3.1999, E.C.R. 1999, I-1484-1498; ECJ Case C-208/00, *Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC)*, J. of 5.11.2002, E.C.R. 2002, I-9943-9976; ECJ Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd*, J. of 30.9.2003, E.C.R. 2003, I-10195-10238; ECJ Case C-210/06, *Cartesio Oktató és Szolgáltató bt*, J. of 16.12.2008, E.C.R. 2008, I-9641 ff.; ECJ Case C-378/10, *VALE Építési kft*, J. of 12.7.2012, nyr.

demics specialised in insolvency law.²⁸

The results and the reactions received were not surprising. There was a common view that the EIR was a good functioning instrument but, however, not without some deficiencies. Main problems were seen as follows:²⁹

1. Some Member States have introduced new proceedings in the last years, due to the fact that the EIR's scope does not cover national procedures that aim at the restructuring of the company at a pre-insolvency stage ('pre-insolvency proceedings') and proceedings which leave the existing management in place ('hybrid proceedings').³⁰ Such proceedings have remained outside the scope of the EIR.
2. There have been difficulties as to the application of the concept 'COMI', and the rules on international jurisdiction have been criticised for allowing forum shopping through abusive 'COMI' location.
3. The opening of the secondary proceedings may hamper the successful restructuring of a debtor due to two facts: The liquidator in the main proceedings no longer has control over the assets in the other Member States, and the secondary proceedings at the moment have to be winding-up proceedings.
4. The present EIR lacks rules on publicity of insolvency proceedings and the lodging of claims, which are essential for the good functioning of cross-border insolvency proceedings. This is crucial, especially for the small creditors and small-medium sized enterprises, which do not have the financial means in order to monitor the debtor.
5. The Regulation does not contain any rules dealing with the groups of companies, although international enterprises operate mostly through subsidiaries. The lack of such specific rules makes a restructuring as a whole harder and results in a break-up of the group.

The revision of the Regulation aims to improve the efficiency of the instrument and ensure the smooth functioning of the internal market and its stability in

28 External Evaluation of the Council Regulation (EC) No 1346/2000 on insolvency proceedings, JUST/2011/JCIV/PR/0049/A4, presented by Prof. *Burkhard Hess*, Prof. *Paul Oberhammer* and Prof. *Thomas Pfeiffer*.

29 See the Explanatory Memorandum to the proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings, 2012/0360 (COD).

30 For instance, Austria – Reorganisationsverfahren, France – mandat ad hoc, conciliation proceedings, sauvegarde financière accélérée, Germany – Schutzschirmverfahren (Sect 270b InsO), United Kingdom – schemes of arrangement (part 26 Companies Act).

economic crises. This objective is also in line with the current priorities of the EU set out in the Europe 2020 strategy,³¹ namely to promote economic recovery and sustainable growth, a higher investment rate and the preservation of employment.

Following the consultation period the view of the stakeholders on the reform can be summarised as follows: The majority demanded the extension of the scope of the Regulation to ‘pre-insolvency’³² and ‘hybrid’³³ proceedings. There were different views regarding the procedures to be inserted in the Annexes and where court supervision should be required. It was mainly clear that the Regulation should apply to private individuals and self-employed persons. Regarding the jurisdictional issues, three quarters of the respondents approved of the use of the ‘COMI’ concept for the opening of the main proceedings despite the practical problems in the interpretation of the concept by case-law. Almost half of the respondents pointed to the abusive location of ‘COMI’, indicating evidence. Half of the respondents were not satisfied with the coordination between main and secondary proceedings. While three quarters of the respondents saw the lack of rules on the mandatory publication of the decision on opening the insolvency proceedings as a problem, almost the ones who expressed an opinion considered the lodging of the claims also problematic. Almost half of the respondents felt the necessity of specific rules regarding groups of companies.

Taking into account the evaluation study, the answers of the respondents from all Member States of the EU – except for Denmark, the case law of the ECJ on the Regulation, the realities of the time being, and the objectives of the Europe 2020 Strategy, a proposal has been produced which can be summarised in five headlines as follows:

1. Scope: The proposal amends the definition of the term ‘insolvency proceedings’ in Art. 1(1) EIR to cover also proceedings which do not involve a liquidator but in which the assets and affairs of the debtor are

31 Communication from the Commission: Europe 2020 – A Strategy for Smart, Sustainable & Inclusive Growth, 3.3.2010, COM (2010) 2020 final, following the Lisbon Strategy from 2000-2010.

32 ‘Pre-insolvency proceedings’ can be classified as proceedings that are *quasi*-collective and take place under the supervision of a court or an administrative authority. They give the debtor in financial difficulties the possibility to restructure at a pre-insolvency stage and avoid the commencement of the insolvency proceedings in the traditional sense.

33 ‘Hybrid proceedings’ refer to the proceedings in which the debtor retains some control over its assets and affairs although subject to the control and supervision by a court or an insolvency practitioner.

subject to control or supervision by a court. As a result of this, debtor-in-possession proceedings will benefit from the EU-wide recognition of the effects of the insolvency proceedings. It would also allow more personal insolvency procedures to be covered by the Regulation. Express reference has been made to proceedings for the ‘adjustment of debts’ and to the ‘purpose of rescue’ in order to include these proceedings that take place at pre-insolvency stage to ‘insolvency proceedings’.³⁴

The proposal does not encompass a number of national law proceedings which have a confidential nature until they become public. Due to the contractual and confidential nature of these proceedings, a court or a creditor located in another Member State would not be aware of these proceedings pending, and as a result it would be difficult to recognise their effects EU-wide. It remains by the Member States to decide whether to notify a certain insolvency proceeding to be included in the Annex A. However, a new procedure is introduced by which the Commission examines whether the national proceeding notified fulfils the conditions of the amended definition. It is to ensure that the proceedings in the Annex A match the definition in Art. 1(1) EIR.

2. Regarding jurisdiction for opening insolvency proceedings, the proposal retains the ‘COMI’ concept, which is considered as being in line with the same concept used in the UNCITRAL Model Law. However, it complements the definition of ‘COMI’ and introduces a provision determining the ‘COMI’ of natural persons. A new Recital which codifies the ‘*Interedil*’³⁵ decision of the ECJ clarifies the conditions under which it is possible to rebut the presumption that the ‘COMI’ of a legal person is the place where the registered office is located. The proposal also requires the court to examine its jurisdiction *ex officio* prior to opening insolvency proceedings and mention the grounds for its establishment of jurisdiction. All foreign creditors are granted a right to challenge the opening decision, and the proposal would ensure that they are informed of the opening decision in order to exercise this right. These amendments have the aim of reducing the cases of forum shopping and non-genuine relocation of the ‘COMI’. The proposal codifies the ‘*Deko*

34 These amendments are made supposedly to bring the Regulation in line with the UNCITRAL Model Law, available at: <http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html>.

35 ECJ Case C-396/09, *Interedil Srl, in liquidation v. Fallimento Interedil Srl, Intesa Gestione Crediti SpA*, J. of 20.10.2011, E.C.R. 2011, I-9939-9962.

*Marty*³⁶ judgment of the ECJ, according to which the courts opening the insolvency proceedings also have jurisdiction for actions which derive directly from insolvency proceedings and are closely linked with them. Where such an action is related to another action against the same defendant that is based on general civil and commercial law, the liquidator is given the possibility to bring both actions in the courts of the defendant's domicile if these courts are competent according to Brussels I Regulation 44/2001.³⁷

3. Secondary insolvency proceedings can be opened in case of an establishment in another Member State, and the proposal has brought several amendments to this Article. The court that is addressed for opening the secondary proceedings should be able, if requested by the liquidator in the main proceedings, to refuse the opening or to postpone the decision if such opening would not be necessary to protect the interests of the local creditors. The opening of the secondary proceedings should not be necessary if the liquidator of the main proceedings promises the local creditors that they would be treated in the main proceedings as if secondary proceedings had been opened and that the rights they would have had in such a case with respect to the determination and ranking of their claims would be respected in the distribution of the assets. This has been already applied in practice with regard to the UK.³⁸ Such a practice is currently not possible under the law of many Member States, and for this reason the proposal introduces a rule of substantive law enabling the liquidator to give such undertakings to local creditors with binding effect on the estate.³⁹

The liquidator may request the opening of the secondary proceedings to facilitate the administration of complex cases for the efficient administration of the debtor's estate. The court addressed to open the secondary proceedings is obliged to hear the liquidator of the main proceedings so that it is informed about a rescue or reorganization option and can assess the impacts of the secondary proceedings on such procedures. The liquidator may challenge the decision to open the secondary proceedings.

36 ECJ Case C-339/07, *Christopher Seagon v. Deko Marty Belgium NV*, J. of 12.2.2009, E.C.R. 2009, I-767 ff.

37 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, pp. 1-23.

38 See the cases *Collins & Aikman*, *MG Rover* and *Nortel*.

39 It is a very important development that the proposal foresees here rules of substantive law.

Pursuant to the proposal, secondary proceedings do not have to be winding-up proceedings anymore so that the rescue or restructuring of the debtor will not automatically be obstructed. This amendment should be without prejudice to the rules on the recovery of state aid and the jurisprudence of the ECJ on recovery from insolvent companies.⁴⁰

The proposal brings an obligation for the courts involved in the main and the secondary proceedings, which was regulated explicitly only for the liquidators in the EIR, that can be crucial for a successful restructuring.

4. Certain minimum information⁴¹ relating to insolvency proceedings has to be made available in an electronic register that can be accessed free of charge via the internet for the publicity of insolvency proceedings and lodging of claims. The interconnection of the national registers will be enabled to be accessed by the European e-justice portal. The proposal facilitates the lodging of claims of foreign creditors, especially small creditors.⁴²
5. Regarding groups of companies, the present situation – namely the entity-by-entity approach of the Regulation – will be maintained. The proposal introduces an obligation to coordinate the insolvency proceedings in the same way as main-secondary proceedings. For such cooperation different procedural instruments can be used depending on the circumstances of the case. Protocols are explicitly mentioned in the proposal in order to promote their use and due to their significance in practice. Moreover, the proposal gives each liquidator standing in the proceedings concerning another member of the same group, and he also has the right to attend the meetings of creditors. The liquidator is provided with strong procedural tools in order to achieve a successful restructuring of all companies also in cases where the liquidator of a proceeding concerning a member of the group does not want to cooperate or agree to the reorganization plan.

40 ECJ Case C-454/09, *European Commission v. Italian Republic*, J. of 13.10.2011, E.C.R. 2011, I-150-151 (Summary Publication).

41 The date of opening, the date of closing proceedings, the type of proceedings, the debtor, the liquidator appointed, the decision opening proceedings as well as the decision appointing the liquidator, the deadline for lodging the claims. This obligation concerns, however, only companies, self-employed persons and independent professionals but not consumers due to the disparities between the laws of the Member States.

42 By way of standard forms in the official languages of the EU, giving them 45 days to lodge their claim following the publication, legal representation will not be mandatory for lodging a claim in a foreign jurisdiction. The aim is to reduce the costs.

Lastly, the proposal does not intend to prevent the existing practice concerning highly integrated groups of companies to determine the 'COMI' of all members of the group in one and the same place and open proceedings only in a single jurisdiction.

A contribution of Prof. Dr. Josef Falke for legal science in Kosovo and Eastern Europe

The example of the PhD Dissertation of Prof. Dr. iur. Haxhi Gashi (“A comparative analysis of the transformation of state/social property with a focus on privatization and restitution in post-communist countries: Kosovo as a sui generis case of privatization”)

HAXHI GASHI

The Dissertation has been supervised by the honored Prof. Josef Falke, first supervisor, and Prof. Dr. Christine Godt, second supervisor. The Dissertation is published by *Nomos* for *Schriftenreihe des Zentrums für Europäische Rechtspolitik der Universität Bremen (ZERP)*, no 66, August 2013, 243 pp., broschiert, ISBN 978-3-8487-0726-3.

The aim of the paper

This paper aims to show the content of the Dissertation as a specific contribution of Prof. Josef Falke and Prof. Christine Godt as supervisors to the PhD Dissertation of Prof. Haxhi Gashi as author and former PhD candidate on the occasion of Prof. Josef Falke’s 65th birthday and his contribution to legal science in Kosovo and Eastern Europe. This is because the book is a comprehensive comparative analysis of the experiences of eight countries during the privatization process: Former East Germany, Hungary, Poland, the Czech Republic, Slovenia, Croatia, FYR of Macedonia, and Kosovo as a specific case. The supervisors have had a considerable impact through discussions, suggestions and recommendations from the beginning to the end of the Dissertation in order to ensure the quality of the research and the final results. The Dissertation treats a number of issues related to the transformation of property in post-communist countries and provides a number of answers based on the comparative analysis of the different economic and legal systems which are summarized below.

Introduction

The PhD Dissertation begins with an Introduction which generally outlines the transformation of property in post-communist countries and identifies a num-

ber of issues and challenges concerning the privatization process. As emphasized in the introduction: “Privatization of state and social ownership was the biggest political, economic and legal challenge in many former socialist states during their transition to democracy and a market economy in the 1990s”. The collapse of the socialist economic system has compelled countries to change their economic concept and avoid the shortcomings of the system by replacing the planned economic system with a market economic system (p. 21). In this regard, the privatization of socially owned property and the strengthening of private property were considered as a priority issue but also as a difficulty of post-communist economic transformation (p. 21).

The economic reforms and the transformation of property faced difficulties for two primary reasons: 1) finding the most appropriate route to creating a new property regime and 2) respecting property rights in the process (p. 21). The first issue is closely related to the reallocation of resources to new market stakeholders, which raises the question of how to find a model for transforming the property. It has been proved that even after several years since the beginnings of transition, there have been different trajectories of transformation from a centralist economy to a decentralized economy based on a free market. The second issue is closely related to the resolution of property disputes as a precondition of free market democracy by respecting international standards in the field of protecting property rights, and also the EU requirements for membership for the states that want to join the EU. As has been pointed out by Prof. Josef Falke (p. 1 of the assessment), one of the most challenging tasks in the political field and for completing this Dissertation is to find a convincing answer for the following basic question that is raised on p. 21, which marks two conflicting orientations: “What is the fundamental priority of property reforms: to remedy the injustice of the past and build the rule of law or to complete the transition quickly to a free market economy without paying attention to the property rights?” (p. 21).

In order to contribute to the open problem, the PhD thesis aims to address the following issues: the need for the transformation of state/social property to private property, the conflicts of interests regarding the privatization process, the appropriate model of privatization, the rights of the employees in privatized enterprises, the possibility of the involvement of all citizens in the privatization process, the property rights of the former owners during the transformation of property, the property disputes in the privatization process in the perspective of international acts for the protection of property rights (p. 24). The discussion of these issues aims to answer the ultimate question: can a “fair balance” be created between transformation of the economic system *vis-à-vis* respecting and treating property rights of former owners and the treatment of property rights of employees? (p. 21). As assessed by Prof. Josef Falke, “[i]n a

very careful manner the author accounts in his analyses throughout the whole Dissertation that economic reforms and the transformation of property is confronted with difficulties for two reasons: “1) finding the most appropriate route to creating a new property regime, and 2) respecting property rights in the process” (p. 1 of the assessment). Prof. Christine Godt assessed that, “[a]lthough this balance has been at the heart of the German experience (molded into the subsequently modified principle of “Rückgabe vor Entschädigung” [restitution prevails over compensation]), neither the conflict nor the justifying reasons have made its way into mainstream legal theory” (p. 1 of the assessment).

Answers to these questions are given by analyzing several cases of transformation of property. These analyses include the cases of transformation of property in the following eight countries: Hungary, the Czech Republic, Poland, Former East Germany, Slovenia, Croatia, Former Yugoslav Republic of Macedonia (FYROM) and Kosovo. Kosovo is distinguished as a special case based on the specific circumstances in which privatization was prepared and implemented. The Dissertation is systematized in three Parts with eight chapters. Part I includes Chapters 1 to 4, analyzing the cases of seven countries: Hungary, the Czech Republic, Poland, Former East Germany, Slovenia, Croatia and Macedonia. Part II includes Chapters 5 to 7 that analyze the transformation of social property in Kosovo as a special case. Part III includes Chapter 8, in which conclusions are drawn.

As pointed out by Prof. Christine Godt in her assessment related to the methodology of analyses (p. 1), “[t]he description of the types of property conversion as implemented in other Eastern European Countries can certainly be found elsewhere as well (Chap. 2, 3). However, not only is the concise description brilliant in formatting four model types, and explaining how these are combined, but for the thesis undertaken it provides a *conditio sine qua non* for the understanding of the choice made in Kosovo (Chap. 6, 7)”.

In addition, the transformation practice shows remarkable differences in the treatment of the other important issue of transformation: the restitution of property to former owners. The underlying problem is to find a fair compromise between economic rationality and the necessity to build new and competitive enterprises which can fulfil consumer demands and offer new employment possibilities on the one hand and on the other hand to respect human rights related to property and basic aspects of the rule of law. Prof. Josef Falke pointed out that, “[g]iven these complexities the author draws the conclusion not to focus on grouping the states in relation to different models of privatisation and restitution. Instead each state is analysed separately as a case study. This method of analysis may be strange and unexpected in the context of economic, social or political science but it is convincing for the aim of an ambitious comparative legal study. It is based on the perception that even though

some states have implemented one model of privatisation – and related to this of restitution – as a predominant model, these states were also pushed by many circumstances and conditions to implement other methods in order to speed up the privatisation process and create social consensus” (pp. 9 f.). “The comparative study is not only ambitious but very insightful in respect of different economic and social aims and consequences as well as of different political and legal cultures” (Prof. Josef Falke, p. 2 of the assessment).

Brief content of each chapter

Chapter 1

This chapter is focused on reviewing the need for transforming the economy from a centrally planned economy to a market oriented economy and the concept of privatization. It is impossible to understand the concept of privatization and the implementation of different methods of transformation without considering the importance of the issue of economic transformation. This chapter focuses on analyzing the reasons that pushed countries to make changes in the economic concept from a centrally planned economy to a free market economy. Furthermore, the preconditions for successful privatization are analyzed and also some legal dilemmas of the privatization process are briefly discussed (p. 25). These issues are discussed in detail throughout pp. 31-53. This chapter was a precondition to understand not only the need for economic transformation but also the models of privatization.

Brief conclusions

Based on the research of different sources of literature, legal acts and reports, the chapter ends with short conclusions. It is concluded that the idea of transformation of property is strongly supported as a need for avoiding the shortcomings of state/social property. State property and the Centrally-Planned Socialist Economy respectively, failed to fulfill social demands (p. 53). These consequences arose partially due to the lack of competition and bankruptcy of Socially Owned Enterprises (SOEs); that directly has had an impact on the low level of initiative and efficiency needed to comply with social demands. On the other hand, transferring state/social property to private hands will increase the efficiency of such property, because the market will determine the business performance of enterprises in order to survive in the market where fair competition is the key regulator. The market will determine the demands, goods and prices when private owners have to compete with several players. This directly

involves business incentive in various innovations, not only in order to bring profit for the owner but it helps enterprises to survive, or alternatively, to go bankrupt and out of business (p. 53). Prof. Josef Falke assesses that, “[d]espite a number of shortcomings and unexpected risks in the initial experience of post-communist countries, in the view of the author there does not exist an alternative to privatisation, because there was no way back to communism. He sees the question of social consequences from privatisation more related to the way, efficiency, transparency and fairness during the privatisation process” (p. 3 of the assessment).

In the conclusion, it is emphasized that the transformation process does not mean only changes of the ownership title, or simply transferring state/social property to private property. Although it sets out to create a clear owner of the property that can gain efficiency, there are some preconditions, such as the development of market institutions, that are prerequisites for successful privatization. On the other hand, state/social property was anticipated as a common property perceived to be the property of the society as a whole. The redistribution of such resources required reaching a social consensus in order to resolve certain conflicts of interests during the transformation, such as former owner’s rights and employees rights (p. 53).

Chapter 2

Chapter 2 analyzes the different methods of privatization. It answers the questions of why different methods of privatization are chosen and why there is a lack of a unique method of privatization (pp. 56-59). Furthermore, the analyses are focused on three specific methods of privatization: MEBO or inside privatization, voucher privatization and sale of assets to investors (outsiders) (pp. 59-62). The selected cases for analyses are elaborated in detail to show the different approaches to privatization followed by different countries such as Hungary, the Czech Republic, Former East Germany, Poland, Slovenia, Croatia and Macedonia (pp. 62-90). Each country is analyzed as a separate case by grouping three types of property transformation: MEBO (inside privatization), voucher privatization and sale of assets to investors (outsiders), describing in detail and showing different trajectories of property transformation based on the different circumstances of such countries that determined the models of transformation. The country studies in Chapter 2 are based on the review of relevant literature and respective legislation.

Brief conclusions

It is concluded that, although the transformation of state property into private property was considered imperative for improving economic efficiency, there was no consensus in post-communist countries on how to transform such property. Furthermore, it is concluded that a uniform model approach for such transformation does not exist (p. 90). The privatization experiences of the countries that are subject to this analysis show three methods that are without dictated transformation of property such as insider privatization (MEBO), voucher privatization, sale of assets to investors (outsiders).

The insider privatization method (MEBO) – which gives the employees a portion of the shares on the privatized enterprises with preferential conditions – was implemented as a solution for involving the employees in the process, to avoid objections and to accelerate the privatization process. However, the countries that are the subject of this analysis have considerable differences in terms of the implementation of such model. Hungary and Poland were forced to implement such a model due to different economic and social circumstances, respectively the influence of employees as a result of economic reforms during communism following that employees gained considerable managing rights in the enterprises, but the technique of implementation has been different (p. 91). Contrarily, in the Czech Republic and Former East Germany the economy was more centralized which required a different approach to transformation. The Czech model contrasts the Hungarian and Polish models because the voucher system was the predominant form of privatization, which consisted of a distribution of shares or assets to adult citizens free of charge. Insider privatization was the exception. On the other hand, the Former East German model of transformation represents a special case. It gave priority to the model of sale of assets to the investors for the purpose of improving the economy (p. 91). In Poland, the voucher system was applied and was combined with other methods such as insider privatization and sale of assets to the investors.

The Former Yugoslav Republics such as Slovenia, Croatia and Macedonia, despite having some similarities concerning the model of privatization, differ in some aspects. The influence of the concept of social property has had an impact on the insider privatization method, which was implemented as a primary model. On the other hand, after the independence of these countries, insider privatization remained the favored method by favoring employees with up to between 50 % and 60 % of the shares of enterprises. The techniques of implementation differ among these states. The mass privatization model through voucher differs among these countries, too. These countries implemented the model of sale of assets to investors but with considerable differences among each other (p. 91).

Prof. Christine Godt assessed that “[t]he description of the four types of property conversion as implemented in the various Eastern European countries is most instructive. Not only is the text of the two chapters (2, 3) well structured and comprehensible. More important is that the lucid structure allows the author to transparently describe the mixing, and carve out commonalities crosscutting the four types (p. 139)” (p. 2 of the assessment).

Chapter 3

Answers to the status of property rights of the former owners during the privatization processes are given in chapter 3. Selected cases are treated and analyzed from Hungary, the Czech Republic, Former East Germany, Poland, Slovenia, Croatia and Macedonia. This chapter answers the following questions: How are the property rights of the former owners treated during the privatization process? Which form of restitution or compensation is applied? Which period of time has been taken into account for restitution? Which persons were entitled with rights for restitution? (p. 93). These questions are discussed throughout pp. 93-116. The analysis shows differences and similarities in post-communist countries in the treatment of the property rights of the former owners. It is argued that a uniform approach does not exist for the treatment of the former owner’s rights. In this chapter the question of the restitution of property of the former owners is treated separately from the privatization methods treated in chapter 2.

Brief conclusions

The issue of restitution has been a necessary concern in post-communist countries that must be addressed in a manner as to create a balance between the rights of former owners for the return of confiscated properties, but also the need for economic development of post-communist countries. Achieving such a balance has been very difficult; the practice in the post-communist vein indicates that there were no unique positions, and each country has pursued its way in the form that it has perceived to be appropriate (pp. 116-117).

The countries analyzed differ substantially when it comes to privatization and restitution balance. Thus, some countries have put priority on the restitution of property to the former owners before privatization (the Czech Republic, Germany, Slovenia and Croatia). Germany changed its position after a year, giving priority to privatization as an important precondition of economic development, because restitution had prevented privatization, while restitution was solved simultaneously or later. Hungary, Poland and Macedonia have giv-

en priority to privatization. The form of restitution also differs substantially, some of these countries have preferred the return of the same property, and compensation was allowed only when it has been impossible to return because the property has been in use for public interest or due to transactions *bona fide*.

Consequently, the restitution issue and its treatment during the transition period were not expected to be a uniform model. The explanation is that there was not a uniform rule at the international level that could force countries to follow the same approach, but each of those has followed its own version based on the priorities for the future development of a country or influences of the former owners (p. 117).

Chapter 4

The treatment of property rights of the former owners in the perspective of international conventions on the protection of property rights is in the main focus of this chapter. The specific analyses are focused on reviewing cases of the European Court of Human Rights (hereafter ECtHR). Three questions are discussed: 1) Is the right of restitution of property of the former owners recognized under ECtHR practice? 2) Does the practice of the ECtHR dictate which restitution laws relevant states should issue? 3) Does the ECtHR impose an obligation for states to issue restitution laws in order to remedy the injustices of the communist regime? (p. 26). In order to give answers to these questions, a number of ECtHR cases are reviewed. Another question which arises is whether the restitution laws issued by relevant states have to allow for restitution in kind or only for compensation. This question is analyzed in the perspective of ECtHR practice. Some former owner's claims that seek restitution in kind or full compensation are rejected by the ECtHR on the ground of incompatible *ratione materiae*. The chapter also provides some insights into the ECtHR cases related to *equal treatment* of all citizens before the law, with a focus on restitution cases in some relevant post-communist countries. It further deals with the question of whether the ECtHR can obligate states to issue restitution laws in order to protect former owners' rights (pp. 121-129). In addition to the restitution issue some claims of former owners have been submitted to the Human Rights Commission (HRC) of the UN based on the violation of equal treatment. Thus, this chapter also analyzes such practices. Furthermore, analyses show some differences in the practices of the ECtHR and the HRC of the UN in the treatment of equality for the former owners' claims for restitution (p. 129-133).

Brief conclusions

The chapter ends with brief conclusions. The intention of applicants to invoke provisions of the ECHR, respectively Protocol 1, article 1 (P1-1) and Article 14 to protect the right for restitution has been unsuccessful. The practice of the Strasbourg Bodies has rejected the obligation of states to return the property to previous owners. Accordingly, these bodies have avoided the restitution issue on the basis that the Convention and Protocol 1 do not cover the cases of expropriations which occurred in the past, because they do not have a retrospective effect. On this ground the actions were considered inadmissible and were rejected on the basis of incompatible *ratione temporis* (p. 135).

To the question that some states have left aside the return of the property to foreigners or have implemented only a partial compensation, the Strasbourg Bodies have responded that it is the right of the states to determine with their laws the conditions for the return of property based on the general interests of each country. This right derived from the interpretation of P1-1, under which the states enjoy a broad freedom during the assessment of the public interest for issuing the laws to control the use and exploitation of private property. On this basis the Strasbourg Bodies have therefore not considered violations of the right to ownership for returning the property only to former owners who were the citizens of a respective country, or in case where only a partial compensation was given. These cases were rejected on the basis of incompatible *ratione materiae*. In addition, the Strasbourg Bodies also rejected claims which arose for violation of Article 14 of the Convention for *equal treatment* based on the ground that it may be applied only in connection to P1-1. Regarding the question whether the Convention can oblige states to issue restitution laws in order to demonstrate future state readiness to protect private property and enforcing rule of law, the Strasbourg Authorities have declared that they do not have this power. This attitude is based on the interpretation that P1-1 allows a large-scale state assessment for social and economic needs under the so-called “*margin of appreciation*”. It remains at the discretion of each state to decide for – or issue – the restitution laws based on economic and social needs (p. 136).

The UN Bodies have reviewed restitution cases in accordance with Article 26 of the International Covenant on Civil and Political Rights (ICCPR) on the grounds of equal protection before the law for all persons. The UN HRC stated that the events of expropriations that occurred before the ICCPR had been effective for the signatory state cannot be examined because they are outside the competence *ratione materiae*. Regarding the review of cases concerning violations of the rights of the applicants due to the legislation of the state applying a double standard by not allowing the return of property to foreign nationals, the UN HRC has stated that there was a breach of Article 26 of the ICCPR. By

these observations, it was suggested that the states review their legislation in order to create effective tools and ensure the return or compensation of the property. For countries that have applied the same standard for the return of property to all without discrimination, even if they enabled the return of property but only partial compensation applied, the UN HRC stated that there was no violation of Article 26 of the ICCPR by such legislation. This attitude of the states was considered as being objective and reasonable (p. 136).

Chapter 5

The analyses of the transformation of social property in Kosovo focus on a legal explanation of the concept of social property, which is explained in detail in chapter 5. The main question is what type of property was so-called “social property” that was and still is in the process of privatization. At the beginning of the transformation process, the concept of social property was very confusing, not only for domestic persons but also for international experts, such as United Nation Mission in Kosovo (hereafter UNMIK) representatives and other international organizations involved in the process. Some of them considered SOEs as state property, but others had a different view that considered it more as a property of employees (pp. 139-140). The analyses are focused on the legal framework from 1945 to 1989, which shows the development of the concept of social property within the former Yugoslav Federation, of which Kosovo was a part (pp. 140-154).

This chapter shows the legal concept of such property that stands in the middle of private and state property, but it differs because it does not have a clear owner even though it was called “social property” by the Constitution of 1974. The concept of social property in the former Yugoslavia created the so-called third way of economy which implemented the self-managing system giving responsibility for managing the enterprises to the employees. Some legal arguments show that “the State” had a reserved power in such enterprises (pp. 140-157), which raises the question of whether this property was a kind of specific state property. It was given to the employees as representatives of the society, respectively to the state for managing purposes.

Brief conclusions

This chapter argues that even though employees gained a wide range of rights to manage such enterprises, management rights do not mean ownership rights. There is no more doubt that this system differs from centralized economic systems because it has implemented the self-managing system in a more decen-

tralized way. Ownership rights fall only within the scope of the two property rights, *ius utendi* and *use fruendi*. This does not include the third right, *ius disponendi*. It seems that the *ius disponendi* was the reserved power of the state, despite the fact that the state called it an ownership of society at large. This type of *sui generis* property evolved from state property that existed between 1945 and 1950 and was created through different forms such as confiscation, nationalization, agrarian reform, and expropriation. Conceptual changes in social property emerged mainly from the laws regulating the ownership over enterprises, with the aim of giving more rights to the workers in managing the SOEs to establish the system of self-management socialism – a distinct economic model, popularly known as the “third way” (p. 160). However, this was more a legal formulation and interpretation. In reality, state ownership somehow existed within the SOEs as long as the state exercised a role over their affairs. The rest of the right over the affairs of SOEs were with the workers’ power, who legally were in charge to manage the SOEs but could not own the assets (neither the state nor anyone else could own them). Conceptually and legally, this leaves the impression of a kind of specific state ownership but given to the workers for management, and this resulted in social property with shared ownership rights between the state and the workers (p. 160).

Chapter 6

This chapter is focused on the privatization process in Kosovo under the UNMIK authority. Kosovo represents a *sui generis* case of privatization based on the circumstances in which privatization is conducted: 1) The privatization process was carried out under the pressure of defining the final political status of Kosovo, which was the primary preoccupation of Kosovo, but it paid less attention to the debate for privatization. 2) The privatization process was conducted in a country with a shattered economy after the 1999 war and low living standards. 3) Privatization was carried out under UNMIK administration, when Kosovo institutions had only the right to be consulted and to participate in decision-making but the majority of votes in the Agency for Privatization, known as “the Trust Agency”, were vested in international members of the Board of this Agency. UNMIK had the reserved power to abrogate any decision of the Agency. 4) The privatization process is carried out only using a single method – sale of assets to investors. Although the concept of social property was closer to the employees’ ownership than state property in other post-communist countries, contrarily to those countries, the inside privatization methods or the Employees’ Buy-Out is not implemented in Kosovo. There is no voucher privatization implemented to distribute such property to large groups of the population. These specific elements of the privatization process in Kosovo are dis-

cussed and analyzed in this chapter. Further analyses aim at explaining the model of privatization in Kosovo and legal confusion in regard to creating clear ownership of the privatized property (pp. 161-189).

Brief conclusions

It is concluded that privatization of social property in Kosovo represents a specific case which could be qualified as a *sui generis* privatization. This process was conducted under specific circumstances, such as: the pressure of unresolved political status, the lack of a debate on privatization, institutional and economic underdevelopment with low living standards, heading of the privatization by UNMIK, and the implementation of only a single model of privatization through the sale of assets to investors (p. 189).

Privatization could be seen as a process with some perspectives and difficulties. It could be considered as a necessary process based on the need for reconstructing the economy towards a free market and development. It represents also a necessary action for developing the SOEs and protecting against their future devaluation by increasing investment with fresh capital that may come from private owners, because the state was no longer in a position to invest in them or provide for subsidies. In some cases it has been successful to reconstruct and improve the performance of some enterprises, but in many others it has failed. Furthermore, the privatization fund is not capital in circulation for the economic development of Kosovo, but its primary purpose is to be used for resolving ownership claims (p. 190).

The model of privatization represents a unique case because it was based only on the sale of assets to investors. It can be considered an appropriate model to attract investors because the New Cooperation's (NewCos) were free of any creditors' claims, whilst the old SOEs remained to be liquidated. No method of insider privatization or voucher system was part of privatization and thus implemented. The employees of the privatized enterprises are entitled to receive 20 % of the proceeds from the sale of enterprises (p. 190).

Chapter 7

The analyses of this chapter aim at answering questions of resolving property disputes during the privatization process in Kosovo. The privatization process in Kosovo was more complicated than in other post-communist countries as a consequence of the concept of social property and transformations or emergence of SOEs in Kosovo during forced measures by the *Milosevic* regime. Many claimants have challenged the Kosovo Trust Agency actions in regard to

privatization. Also, the former owners whose property was seized during the communist regime submitted their claims to a special court targeted at resolving disputes regarding the privatization matters (pp. 191-193). Thus, this chapter analyzes in legal and practical perspectives the matter of property rights in regard to the privatized property. The analyses are focused on the evaluation of the legal framework, cases of the Agency of Privatization and also court cases. Specific focus is given to the restitution issue as a matter not covered by legislation. Some legal obstacles are discussed, and also some solutions for resolving the problem are recommended (pp. 193-206).

Brief conclusions

Privatization in Kosovo has generated many conflicts of interests over property, which is associated with the need to resolve them. To resolve ownership claims and disputes, a Special Chamber or Court has been established and put into operation for such a challenging task. Referring to the cases, the Court does not take into account and does not have a legal basis to accept or approve the creditors' ownership claims, and the claimants are not able to prove their claims that privatization was undertaken and implemented in compliance with applicable laws of the time and does not violate the European Convention of Human Rights. If a party is able to prove the claim in accordance with the law, the Court will recognize the claim by approving the right to the claimant to obtain a portion of shares if the SOE is in the process of privatization; if privatization is already completed, then the Court will approve compensation to the claimant from the Privatization Fund (p. 206).

For the employees' claims for their unpaid salaries during the period 1989-1999, the Agency for Privatization and the Court declared that the Agency, which is in charge of privatizing the SOEs, takes their ownership status as it was in 1989 when Kosovo's autonomy was forcibly abolished by Serbia. Therefore, claims made by these employees after 1989 are rejected. Any ownership and legal change in the SOEs after this year is not recognized, because the SOEs that are subject to privatization are not the successor of the enterprises transformed during the period 1989-1999 under the discriminatory legislation of Serbia, but their recognized status, as already mentioned, is that of 1989 (p. 206).

It is concluded that there is still no legal basis to address the former owners' claims in the SOEs subject to privatization or over privatized property. Therefore, restitution is a matter that should be treated for the purpose of equal treatment of all citizens before the law. This is a difficult problem from the view of proving ownership, lack of clear evidence, and difficulties in determin-

ing the extent of restitution – whether it should include the period before World War II or only the communist period. Taking into consideration that by now the overwhelming majority of SOEs have been privatized, the only acceptable or most preferred solution to restitution can be compensation (pp. 206-207).

Chapter 8 draws general conclusions (pp. 209-223).

Conclusion

Taking into account the content and a comprehensive study of the eight post-communist countries' experiences during the privatization process (Eastern Europe Transition Countries), there is no doubt that the work of the supervisors has been hard in order to oversee such a Dissertation. This required a special attention and a commitment to review the data presented and the conclusions drawn. It is more so because the selected cases for study are analyzed separately as a case study, which means focusing attention on the chronology from the point of view of methodology, questions raised, data and information and answers given, and results respectively. This required a few years of work from the beginning draft to the final work/completed text, and its defense.

Prof. Josef Falke as a first supervisor and Prof. Christine Godt as a second supervisor have made an extraordinary contribution without any hesitation through personal contacts/meetings, via e-mails and phone, discussion, advice, and recommendations taking into account the nature of the problem treated in this Dissertation. They have also taken maximum care to ensure that this book meets the highest possible professional criteria required for a PhD. It is a contribution to legal science in Eastern European countries, particularly in Kosovo and other transition countries. I am very thankful to the supervisors for their valuable contribution from the beginning to the end of this book.

Die Zulässigkeit von „politischen Belangen“ im *Government Procurement Agreement (GPA)*

FELIX STEENGRAFE

A. Einleitung

Die Zulässigkeit der Beachtung von „politischen Belangen“ im Vergaberecht ist immer wieder Gegenstand von juristischen Streitigkeiten, wie etwa die Entscheidungen des Europäischen Gerichtshofes (EuGH) in den Rechtssachen *Wienstrom*,¹ *Concordia Bus Finland*² oder zuletzt *Max Havelaar*³ verdeutlichen. Dennoch wurde kein *World Trade Organisation (WTO)*-Streitbelegungsverfahren über die Zulässigkeit von „politischen Belangen“ im GPA vollständig durchgeführt, und einzig der Fall *US-Massachusetts-Burma Law*⁴

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- 1 EuGH Rs. C-448/01, *EVN AG, Wienstrom GmbH/Republik Österreich*, U. v. 4.12.2003, Slg. 2003, I-14527. Nach einer Vorlage des Bundesvergabeamtes musste der EuGH entscheiden, ob nach den Vorschriften der öffentlichen Auftragsvergabe und insbesondere Art. 26 der Richtlinie 93/36/EWG ökologische Kriterien beachtet werden dürfen. In dem Vergabeverfahren wollte die Vergabestelle Strom aus erneuerbaren Energiequellen beschaffen. Nach der Ansicht des EuGH ist ein Zuschlagskriterium, wonach der zu beschaffende Strom aus einer erneuerbaren Energiequelle stammen muss, zulässig.
 - 2 EuGH Rs. C-531/99, *Concordia Bus Finland Oy Ab/Helsingin kaupunki, HKL-Bussilikenne*, U. v. 17.9.2002, Slg. 2002, I-7213. Nach der Vorlage eines finnischen Gerichts entschied der EuGH über die Frage, ob nach der Dienstleistungs Koordinierungsrichtlinie 92/50/EWG Umweltschutzkriterien bei der Bestimmung des wirtschaftlich günstigsten Angebots beachtet werden dürfen, was der EuGH bejahte.
 - 3 EuGH Rs. C-368/10, *Europäische Kommission/Königreich der Niederlande*, U. v. 10.5.2012, noch nicht in der Slg. In der Provinz Nord-Holland wurde ein Vergabeverfahren über die Beschaffung und Bestückung von Kaffee- und Teeautomaten durchgeführt. Im Lastenheft nahm die Vergabestelle Qualitätsanforderungen für Kaffee und Tee sowie einzelne Zutaten auf. Diese Qualitätsanforderungen umfassten auch, dass die Güter über das EKO-Gütezeichen sowie das MAX HAVELAAR-Siegel verfügen sollten. Das EKO-Gütezeichen nimmt Bezug auf die ökologische Produktion und das MAX HAVELAAR-Siegel auf den fairen Handel. Beides sind niederländische Gütezeichen. Im Ergebnis ist das Urteil des EuGH wohl so zu verstehen, dass diese Anforderungen – unabhängig von den speziellen Fallumständen – zulässig sind.
 - 4 In dem Fall *US-Massachusetts-Burma Law* war Streitgegenstand ein Gesetz, dass der US-amerikanische Bundesstaat *Massachusetts* – unter anderem auf Druck von

war kurzzeitig Gegenstand eines Rechtsstreits. Die Bedeutung der Frage der Zulässigkeit von „politischen Belangen“ folgt einerseits aus der ökonomischen Bedeutung des Vergabewesens – so betrug 1998 der Umfang der öffentlichen Beschaffung in den *Organisation for Economic Co-Operation and Development* (OECD)-Ländern 19,96 Prozent und in den Nicht-OECD-Staaten 14,48 Prozent des Bruttoinlandsprodukts⁵ – und andererseits aus der (auch aus der ökonomischen Bedeutung folgenden) staatlichen Steuerungs- und Lenkungs-funktion des Vergaberechts, zumal durch die Vergabeentscheidung eine Viel-zahl von Zielen, wie beispielsweise der Umweltschutz, der Schutz von Arbeit-nehmern, die Förderung von benachteiligten Personengruppen oder Regionen, gefördert werden kann. Aufgrund dieser wirtschaftlichen Werte und der aus diesen folgenden möglichen staatlichen Einflussnahme auf die Wirtschaft ist die Frage, ob „politische Belange“ durch das Vergabewesen verfolgt werden dürfen, von erheblicher Bedeutung.

B. Die Vergabe von öffentlichen Aufträgen

Ein öffentlicher Auftrag ist ein entgeltlicher Vertrag zwischen einem öffent-lichen Auftraggeber und einem privaten Bieter, wodurch sich der Bieter zur Lieferung von Waren, zur Erbringung von Dienst- oder Bauleistungen oder zur Übertragung von Rechten verpflichtet.⁶ In vielen Staaten wird das Vergaberecht als ein Instrument zur Verwirklichung von Zielen genutzt, die

Non-Governmental Organisations (NGOs) – 1996 erließ. Nach diesem Gesetz soll-ten Unternehmen, die mit oder in Burma Handel trieben, im Rahmen der Vergabe von öffentlichen Aufträgen nicht berücksichtigt werden. Hierdurch sollte Druck ge-genüber Burma erzeugt werden, um die dortige Menschenrechtslage zu verbessern, und einige Unternehmen stellten auch tatsächlich ihre geschäftlichen Beziehungen zu Burma ein (vgl. *Götz Götttsche*, § 23 Öffentliches Beschaffungswesen, in: Mein-hard Hilf/Stefan Oeter (Hg.), *WTO-Recht – Rechtsordnung des Welthandels*, 2. Aufl., Baden-Baden 2010: Nomos Verlag, Rn. 39).

5 *OECD*, *The Size of Government Procurement Markets* (2002), S. 8, zu finden unter: <<http://www.oecd.org/newsroom/1845927.pdf>> (letztmals aufgesucht am 22.1.2014); *Peter-Tobias Stoll/Frank Schorkopf*, *WTO – Welthandelsordnung und Welthandels-recht*, Köln [u.a.] 2002: Carl Heymanns Verlag, Rn. 407.

6 *Heiko Büsing*, *Das WTO-Übereinkommen über das öffentliche Beschaffungswesen*, Göttingen 2002: Cuviller Verlag, 10; *Christoph Gusy*, *Staatsaufträge an die Wirt-schaft*, JA 1989, 26-35, 26; *Ludwig Gramlich*, *Das Recht der öffentlichen Aufträge nach Abschluß der Uruguay-Runde des GATT*, RIW 1995, 792-803, 794. Im Ergeb-nis so auch *Richard Senti*, *WTO – System und Funktionsweise der Welthandelsord-nung*, Zürich 2000: Schulthess Juristische Medien, Rn. 1435; *Eva Waller*, *Das inter-nationale Recht des geregelten Vergabewesens*, Berlin 1998: Logos Verlag, 13.

außerhalb der eigentlichen Beschaffung liegen.⁷ Eine solche Instrumentalisierung der Vergabe von öffentlichen Aufträgen ist aufgrund der ökonomischen Bedeutung des öffentlichen Beschaffungswesens möglich, denn immerhin umfassen diese bis zu 15 Prozent des Bruttoinlandsprodukts eines Staates.⁸ In Deutschland beläuft sich der Wert der Bedarfsdeckung des Bundes und der Länder auf eine Summe von über 250 Milliarden Euro.⁹ Weltweit wird der Wert der öffentlichen Beschaffung auf 5,5 Billionen US-Dollar geschätzt.¹⁰ Diese Werte verdeutlichen die ökonomische Bedeutung des Vergaberechts und darüber hinaus wird diese wirtschaftliche Bedeutung noch dadurch verstärkt, dass der Staat teilweise alleiniger Nachfrager der angebotenen Leistung ist, wie beispielsweise im Tiefbau.

C. „Politische Belange“ im öffentlichen Auftragswesen

Aufgrund der erheblichen ökonomischen Bedeutung der Vergabe von öffentlichen Aufträgen kann diese zur Verfolgung von politischen Zielen genutzt werden,¹¹ wie beispielsweise dem Schutz des Mittelstandes, dem Umweltschutz, der Stärkung von wirtschaftlichen Strukturen in wirtschaftlich schwachen Regionen oder von sozialen Aspekten. Eine solche Instrumentalisierung

7 *Sue Arrowsmith*, Reviewing the GPA: The Role and Development of the Plurilateral Agreement After Doha, JIEL (2002) 5 (4), 761-790, 781; *Jens-Christian Gaedtke*, Politische Auftragsvergabe und Welthandelsrecht, Berlin 2006: Duncker & Humblot Verlag, 74; *Paul Weissenberg*, Öffentliche Aufträge – Instrumente neutraler Beschaffung oder staatliche Steuerung?, DB 1984, 2285-2290, 2285. Im Ergebnis so wohl auch *Jost Pietzcker*, Der Staatsauftrag als Instrument des Verwaltungshandelns, Tübingen 1978: J.C.B. Mohr Verlag, 304; *Volker Neßler*, Politische Auftragsvergabe durch den Staat?, DÖV 2000, 145-152, 147.

8 *Marc Bungenberg*, Auf dem Weg zu einem multilateralen Beschaffungsabkommen?, in: Martin Nettesheim/Gerald Sander (Hg.), WTO-Recht und Globalisierung, Berlin 2003: Duncker & Humblot Verlag, 250-272, 250; *Kerstin Odendahl*, Die Berücksichtigung vergabefremder Kriterien im öffentlichen Auftragswesen, EuZW 2004, 647-652, 651. Von einem Wert zwischen 11 und 20 Prozent spricht *Göttsche*, (Fn. 4), Rn. 2; mit weiteren europäischen Werten *Jürgen Schwarze*, Die Vergabe öffentlicher Aufträge im Lichte des europäischen Wirtschaftsrechts, EuZW 2000, 133-144, 133.

9 *Hartmut Maurer*, Allgemeines Verwaltungsrecht, 18. Aufl., München 2011: C.H. Beck Verlag, § 3 Rn. 21. Nach *Göttsche*, (Fn. 4), Rn. 2, beträgt das Volumen der öffentlichen Aufträge in der Bundesrepublik Deutschland (BRD) sogar 360 Milliarden Euro.

10 *Göttsche*, (Fn. 4), Rn. 2.

11 *Neßler*, (Fn. 7), 147. Im Ergebnis so wohl auch *Hermann Ali Hinderer*, Rechtsschutz von Unternehmen in der WTO, Berlin 2004: Berliner Wissenschafts-Verlag, 99.

der öffentlichen Beschaffung wird von so gut wie allen Staaten praktiziert.¹² Es drängt sich daher die Frage auf, wann eine Vergabeentscheidung nicht mehr lediglich der Beschaffung von Gütern, Waren oder Dienstleistungen dient, sondern darüber hinaus auch eine Steuerungs- oder Förderungsfunktion einnehmen soll. In der Literatur werden solche Kriterien teilweise als „vergabefremde Kriterien“ eingeordnet, die nicht auf die jeweilige Beschaffung der Waren oder Erbringung einer Dienstleistung abzielen, welche die öffentlichen Stellen zur Erfüllung ihrer hoheitlichen Tätigkeit benötigen.¹³ Diese Einordnung als „vergabefremde Kriterien“ verkennt jedoch einerseits, dass es durchaus legitim ist, durch das Vergaberecht politische Ziele durchzusetzen,¹⁴ und andererseits, dass ein Kriterium durch die Aufnahme in die Vergabeunterlagen nicht mehr „fremd“ ist.¹⁵ Vorzugswürdig ist aus diesen Gründen die Annahme einer Steuerungs- und Lenkungsfunktion, soweit Ziele im staatlichen Bereich oder eine Gestaltung des öffentlichen Lebens durchgesetzt werden sollen.¹⁶ Diese „politischen Belange“ dienen also nicht lediglich der Erlangung des zu beschaffenden Gutes oder der Erbringung der jeweiligen Dienstleistung, sondern der Verwirklichung von anderen Zielen.

Bisher ist noch nicht abschließend geklärt, inwieweit „politische Belange“ im Rahmen eines Vergabeverfahrens nach dem GPA beachtet werden dürfen. Ein WTO-Streitschlichtungsverfahren wurde bezüglich dieser Frage noch nicht vollständig durchgeführt, denn auch im Fall *US-Massachusetts-Burma Law* erfolgte keine Entscheidung, da der US-amerikanische *Supreme Court* das US-amerikanische Gesetz vor einer Entscheidung für verfassungswidrig erklärte, sodass aus diesem Rechtsstreit auch keine weitere Rechtssicherheit für die Frage der Zulässigkeit von „politischen Belangen“ im GPA folgte.

12 *Arrowsmith*, (Fn. 7), 781; *Gaedtke*, (Fn. 7), 74; *Weissenberg*, (Fn. 7), 2285; *Neßler*, (Fn. 7), 147. Im Ergebnis so wohl auch *Pietzcker*, (Fn. 7), 304.

13 *Christoph Benedict*, Sekundärzwecke im Vergabeverfahren, Heidelberg 2000: Springer Verlag; *Marc Bungenberg*, Nationales, supranationales und WTO-Vergaberecht, in: Gabriele Bauschke/Charlotte Gaitanides [u.a.] (Hg.), *Pluralität des Rechts – Regulierung im Spannungsfeld der Rechtsebenen*, Stuttgart [u.a.] 2002: Richard Boorberg Verlag, 257-275, 267.

14 *Gaedtke*, (Fn. 7), 75.

15 *Wolfgang Weiß*, § 21 Öffentliches Beschaffungswesen, in: Christoph Herrmann/ders./Christoph Ohler, *Welthandelsrecht*, 2. Aufl., München 2007: C.H. Beck Verlag, Rn. 1056.

16 *Gaedtke*, (Fn. 7), 75.

D. Das GPA

Das GPA ist ein plurilaterales Abkommen und nach Art. II:3 WTO-Übereinkommen Bestandteil des Welthandelsrechts. Ein plurilaterales Abkommen entfaltet nur gegenüber den Staaten eine rechtliche Wirkung, die diesem Abkommen explizit beigetreten sind. Hierdurch grenzen sich die plurilateralen Abkommen, wie eben das GPA, von den multilateralen Abkommen, wie dem *General Agreement on Tariffs and Trade* (GATT) oder dem *General Agreement on Trade in Services* (GATS), ab, die jeder Staat, der der WTO beitreten möchte, anerkennen muss. Die WTO-Mitgliedschaft berechtigt somit zu einem Beitritt zum GPA, verpflichtet hierzu jedoch nicht. Durch das GPA soll eine Liberalisierung der nationalen öffentlichen Beschaffungsmärkte erreicht und somit einem staatlichen Protektionismus entgegengewirkt werden. Eine solche Liberalisierung der öffentlichen Beschaffungsmärkte befürworten hingegen nicht alle Staaten, und so sind gegenwärtig nur Industrienationen dem GPA als Mitglieder beigetreten. Die Entwicklungsländer lehnen hingegen eine Mitgliedschaft in dem Abkommen ab und betrachten dieses als einen „*Rich Men's Club*“.¹⁷ Die ablehnende Haltung der Entwicklungsländer gegenüber dem Abkommen folgt daraus, dass die Entwicklungsländer durch das öffentliche Beschaffungswesen gerade bestimmte „politische Belange“ durchsetzen wollen und deshalb – nach ihrer Ansicht – die Vorteile eines Beitritts zum GPA überwiegen.¹⁸ Diese Entscheidung der Entwicklungsländer kann auch Art. V GPA nicht revidieren, wonach bestimmte Interessen der Entwicklungsländer im GPA berücksichtigt werden können. Die geringe Mitgliederzahl dieses plurilateralen Abkommens schmälert die durch das GPA angestrebte Liberalisierung und verdeutlicht zugleich das Interesse der Nationalstaaten an einem protektionistischen Schutz der eigenen Wirtschaft sowie der Sonderstellung des Vergaberechts.

17 *Arie Reich*, *The New GATT Agreement on Government Procurement*, JWT 1997, 125-151, 134.

18 *Hanna Diehl*, *Völkerrechtliche Beschaffungsabkommen – Inhalt und Wirkung im Gemeinschaftsrecht (GPA, EWR, USA und Mexiko)*, Frankfurt am Main [u.a.] 2009: Lang Verlag, 57; *Friedl Weiss*, § 5 Internationales öffentliches Beschaffungswesen, in: Christian Tietje (Hg.), *Internationales Wirtschaftsrecht*, Berlin 2009: De Gruyter Verlag, Rn. 49.

I. Das Inländerprinzip

Das Inländerprinzip im Sinne des Art. III:1 lit. a) GPA untersagt eine generelle Schlechterstellung von ausländischen Bietern sowie der von ihnen angebotenen Waren und Dienstleistungen, wodurch das Inländerprinzip aus diesem Grund einem Diskriminierungsverbot entspricht.¹⁹ Die von den Vergabestellen im Rahmen des Vergabeverfahrens verfolgten „politischen Belange“ gelten sowohl gegenüber einheimischen als auch ausländischen Bietern, weshalb eine Ungleichbehandlung nicht vorliegt und „politische Belange“ nicht gegen das Inländerprinzip im Sinne des Art. III:1 lit. a) GPA verstoßen.

II. Der Meistbegünstigungsgrundsatz

Neben dem Inländerprinzip ist der Grundsatz der Meistbegünstigung eines der Grundprinzipien des GPA, das gemäß Art. III:1 lit. b) GPA die Staaten dazu verpflichtet, Vorteile, die einem Mitgliedstaat gewährt wurden, auch allen anderen GPA-Mitgliedern zu gewähren. Eingeschränkt wird diese Verpflichtung durch die Basisreziprozität. Ferner gilt der Grundsatz der Meistbegünstigung aufgrund des Rechtscharakters des GPA als plurilaterales Abkommen nur gegenüber den Staaten, die dem Abkommen explizit beigetreten sind. Die Beachtung von „politischen Belangen“ stellt auch keinen Verstoß gegen den Meistbegünstigungsgrundsatz im Sinne des Art. III:1 lit. b) GPA dar, denn schließlich gelten die Anforderungen der „politischen Belange“ gleichermaßen gegenüber allen Bietern.

III. Art. VIII GPA

Nach Art. VIII GPA können die Vergabestellen bestimmte bieterbezogene Auswahlkriterien für die Teilnahme an dem Vergabeverfahren vorsehen. Aus dem Wortlaut des Art. VIII GPA folgt unmittelbar, dass der Bieter über die Fähigkeit zur Durchführung des öffentlichen Auftrags verfügen muss. Unbeachtlich sind hingegen die Aspekte, die über die Erfüllung des jeweiligen öffentlichen Auftrags hinausgehen. Dies folgt schon aus dem eindeutigen Wortlaut von Art. VIII GPA. Schließlich ist ein sozial nicht engagierter Unternehmer in der Regel gleichermaßen in der Lage, den öffentlichen Auftrag auszuführen, wie ein Unternehmer, der sich sozial engagiert. Diese Argumentationslinie vertraten auch die Europäischen Gemeinschaften (EG) und Japan in dem Fall *US-Massachusetts-Burma Law* und stützten sich hierbei unter anderem auf den Wortlaut des Art. VIII lit. b) GPA. Deshalb ist beispielsweise

¹⁹ Odendahl, (Fn. 8), 651; Weiß, (Fn. 15), Rn. 1035; Weiss, (Fn. 18), Rn. 32.

ein soziales oder ökologisches Engagement bei bieterbezogenen Auswahlkriterien unbeachtlich, sodass „politische Belange“ im Rahmen der Bieterauswahl nach Art. VIII GPA nicht verfolgt werden dürfen.

IV. Art. XIII GPA

Nach Art. XIII:4 lit. b) GPA erhält in dem Vergabeverfahren entweder das günstigste²⁰ oder das wirtschaftlich vorteilhafteste Angebot²¹ den Zuschlag. Auch wenn durch das GPA das Vergabewesen entpolarisiert und ein staatlicher Protektionismus abgebaut werden sollte, so kann die Formulierung „*most advantageous*“ nicht einzig nach ökonomischen Kriterien bestimmt werden. Eine solche Auslegung kann dem Wortlaut von Art. XIII:4 lit. b) GPA nicht entnommen werden,²² zumal eine Instrumentalisierung der öffentlichen Beschaffung für „politische Belange“ in nahezu allen nationalen Rechtsordnungen erfolgt.²³ In den letzten Jahren hat die Tendenz der Nutzung des Vergaberechts zur Durchsetzung von „politischen Belangen“ stetig zugenommen. So schlug beispielsweise die Europäische Kommission in ihrer interpretierenden Mitteilung „über das auf das Öffentliche Auftragswesen anwendbare Gemeinschaftsrecht und die Möglichkeiten zur Berücksichtigung von Umweltbelangen bei der Vergabe öffentlicher Aufträge“²⁴ vor, dass im europäischen Vergaberecht zum Beispiel Ökostrom explizit von den Vergabestellen nachgefragt werden kann. Auch im deutschen Kartellvergaberecht sind mittelständische Interessen bei der Vergabe von öffentlichen Aufträgen nach § 97

20 Das günstigste Angebot im Sinne des Art. XIII:4 lit. b) GPA ist das Angebot mit dem niedrigsten Preis. Da nur der Preis für die Zuschlagserteilung entscheidend ist, verfügen die Vergabestellen im Rahmen der Zuschlagserteilung dann über keinen Ermessensspielraum.

21 Das vorteilhafteste Angebot gemäß Art. XIII:4 lit. b) GPA ist hingegen das Angebot, das, gemessen an den Bewertungskriterien, das beste Angebot darstellt. Die Bewertungskriterien müssen zuvor in der Bekanntmachung oder den Vergabeunterlagen angegeben werden und die Vergabestellen verfügen bei der Bewertung des vorteilhaftesten Angebots über einen Ermessensspielraum. Regelmäßig erfolgt die Bewertung der Angebote nach einem Punktesystem, und das Angebot mit der höchsten Punktzahl erhält dann den Zuschlag (vgl. *Weiß*, (Fn. 15), Rn. 1055; *Göttsche*, (Fn. 4), Rn. 35).

22 *Weiß*, (Fn. 15), Rn. 1056.

23 *Arrowsmith*, (Fn. 7), 781; *Gaedtke*, (Fn. 7), 74; *Weissenberg*, (Fn. 7), 2285. Im Ergebnis so wohl auch *Pietzcker*, (Fn. 7), 304.

24 Interpretierende Mitteilung der Kommission über das auf das Öffentliche Auftragswesen anwendbare Gemeinschaftsrecht und die Möglichkeiten zur Berücksichtigung von Umweltbelangen bei der Vergabe öffentlicher Aufträge vom 4.7.2001, KOM(2001) 274 endg.

Abs. 3 S. 1 Gesetz gegen Wettbewerbsbeschränkungen (GWB) vornehmlich zu berücksichtigen, und darüber hinaus können die Vergabestellen gemäß § 97 Abs. 4 S. 2 GWB für die Ausführung des öffentlichen Auftrags zusätzliche Anforderungen an den Bieter stellen,

„[...] die insbesondere soziale, ökologische oder innovative Aspekte betreffen, wenn sie im sachlichen Zusammenhang mit dem Auftragsgegenstand stehen und sich aus der Leistungsbeschreibung ergeben. Andere oder weitergehende Anforderungen dürfen an den Auftragnehmer nur gestellt werden, wenn dies durch Bundes- oder Landesgesetz vorgesehen ist.“

Aus diesen Gründen ist die Formulierung „*most advantageous*“ im Art. XIII:4 lit. b) GPA nicht rein wirtschaftlich auszulegen, und so können die Vergabestellen „politische Belange“ im Rahmen der Vergabeentscheidung berücksichtigen. Dies entspricht im Ergebnis auch der Rechtslage in Deutschland, wo „politische Belange“ ebenfalls berücksichtigt werden können, wie etwa nach § 141 Sozialgesetzbuch (SGB) IX, wonach anerkannte Werkstätten für behinderte Menschen einen öffentlichen Auftrag bevorzugt angeboten bekommen. Sofern keine anderen Aspekte, wie zum Beispiel der Umweltschutz, für die Vergabestellen von Bedeutung sind, erfolgt der Zuschlag gemäß § 97 Abs. 5 GWB an das wirtschaftlichste Angebot. Wie bereits gemäß der Formulierung des Art. XIII:4 GPA ist auch nach dieser Vorschrift das wirtschaftlichste Angebot nicht rein ökonomisch zu bestimmen, sodass die Vergabestellen in Deutschland auch nach § 97 Abs. 5 GWB „politische Belange“ berücksichtigen dürfen. Die Bedeutung von „politischen Belangen“ im GPA sowie die Notwendigkeit der Zulässigkeit von diesen werden letztlich auch durch die Tatsache belegt, dass in der – wenn auch noch nicht rechtskräftigen – Fassung des GPA nach der „*re-negotiation*“ „politische Belange“ explizit normiert sind, wie etwa in Art. X:9 GPA, wonach ökologische Anforderungen in die Vergabeunterlagen aufgenommen werden können.

V. *Art. XXIII:2 GPA*

„Politische Belange“ sind zwar mit dem Inländerprinzip und dem Grundsatz der Meistbegünstigung im Sinne des Art. III GPA vereinbar und können bei der Erteilung des Zuschlages nach Art. XIII GPA beachtet werden, allerdings ist dies bei der Auswahl der Bieter nach Art. VIII GPA nicht möglich. Dennoch kann nach Art. XXIII:2 GPA von den Regelungen des Abkommens abgewichen werden, und durch eine Anwendung der „*ordre public*-Regel“ könnten „politische Belange“ auch im Rahmen der Auswahl der Bieter im Sinne von Art. VIII GPA beachtlich sein. Der Anwendungsbereich des Art.

XXIII:2 GPA ist gegenwärtig noch nicht abschließend bestimmt.²⁵ Die Normierung der „*ordre public*-Regel“ könnte zunächst zu dem Schluss führen, dass „politische Belange“ grundsätzlich unzulässig sind, da eine Ausnahmegesetzgebung andernfalls nicht hätte normiert werden müssen.²⁶ Eine solche Annahme verkennt jedoch, dass „politische Belange“ *per se* nicht gegen die Regelungen des GPA verstoßen und die Instrumentalisierung der öffentlichen Beschaffung üblich ist. Darüber hinaus bekennt sich die – wenn auch noch nicht rechtskräftige – Fassung des GPA nach der „*re-negotiation*“ ausdrücklich zu den „politischen Belangen“, wie beispielsweise dem Umweltschutz. Deshalb kann aus der Normierung des Art. XXIII:2 GPA nicht geschlossen werden, dass „politische Belange“ grundsätzlich unzulässig sind.

Durch die „*ordre public*-Regel“ kann zum Schutz der öffentlichen Sicherheit, Ordnung und Sittlichkeit oder zum Schutz des Lebens oder der Gesundheit von Menschen, Tieren oder Pflanzen sowie aus Gründen des Schutzes von geistigem Eigentum oder in Bezug auf die Produkte oder Dienstleistungen von Behinderten, Strafgefangenen oder Wohltätigkeitseinrichtungen von dem GPA abgewichen werden. Diese *Termini* werden im GPA nicht definiert. Allerdings wird in der Fußnote zu Art. XIV lit. a) GATS der *Terminus* der „öffentlichen Ordnung“ definiert. Nach dieser Definition liegt eine Gefahr für die öffentliche Ordnung vor, wenn eine wirkliche, ausreichend schwerwiegende Bedrohung der gesellschaftlichen Grundwerte besteht.²⁷ Aufgrund der besonderen Stellung des GPA im Welthandelsrecht und des abweichenden Wortlauts von Art. XIV lit. a) GATS und Art. XXIII:2 GPA kann diese Definition zwar nicht direkt zur Auslegung des Art. XXIII:2 GPA herangezogen werden; dennoch kann dieser Definition die Wertung entnommen werden, dass die Staaten von den welthandelsrechtlichen Vorschriften nur unter besonderen Umständen abweichen dürfen.²⁸ Ein Indiz für solche besonderen Umstände können der verfassungsrechtliche Schutz dieser Aspekte, eine Vielzahl von Gesetzen oder eine gefestigte höchstrichterliche Rechtsprechung sein.²⁹ Neben diesen nationalen Gründen für eine Anwendung der „*ordre public*-Regel“ können auch internationale Standards, etwa im Umweltschutz oder im Bereich des Schutzes von Arbeitnehmern, eine Abweichung von den Vorschriften des GPA rechtfertigen, sofern einer der in Art. XXIII:2 GPA normierten Gründen vorliegt und der *Chapeau*

25 *Arrowsmith*, (Fn. 7), 780.

26 So *Bungenberg*, (Fn. 13), 270.

27 Erläuterung zu Art. XIV lit. a) GATS, zu finden unter:
<http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gats_02_e.htm#14>
(letztmals aufgesucht am 22.1.2014).

28 *Gaedtke*, (Fn. 7), 183.

29 *Gaedtke*, (Fn. 7), 188.

eingehalten wurde. Deshalb besteht unter Umständen die Möglichkeit der Beachtung von „politischen Belangen“ im Rahmen der Bieterauswahl nach Art. VIII GPA, sofern dies in dem jeweiligen Einzelfall nach Art. XXIII:2 GPA gerechtfertigt wäre.

E. Fazit

„Politische Belange“ sind demnach sowohl mit dem Inländerprinzip als auch mit dem Grundsatz der Meistbegünstigung vereinbar. Schließlich gelten die von der Vergabestelle geforderten Aspekte gleichermaßen für alle einheimischen und ausländischen Bieter. Im Rahmen der Erteilung des Zuschlages nach Art. XIII GPA können die Vergabestellen, soweit der Zuschlag an das vorteilhafteste und nicht an das billigste Angebot erfolgt, „politische Belange“ berücksichtigen. Bei der Bieterauswahl im Sinne des Art. VIII GPA sind diese Belange jedoch unzulässig, soweit eine Beachtung dieser Aspekte nicht durch eine Anwendung der „*ordre public*-Regel“ im Sinne von Art. XXIII:2 GPA gerechtfertigt werden kann.

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