Prof. Dr. Alexander Trunk

Vorlesung: Rechtsvereinheitlichung

SS 2015

20.7.2016: Rechtsvereinheitlichung im Insolvenzrecht

In der letzten Vorlesungsstunde haben wir uns mit der Rechtsvereinheitlichung im ZivilprozessR befasst, heute – in der abschließenden Veranstaltung - möchte ich mit Ihnen die Rechtsvereinheitlichung in einem anderen praktisch sehr wichtigen und auch wissenschaftlich sehr interessanten Themenbereich besprechen, der im Schnittpunk von VerfahrensR und materiellem Recht liegt, dem Insolvenzrecht.

Vorab Hinweis auf Möglichkeit zur Teilnahme eines Kieler Studierendenteams am Willem C. Vis International Commercial Arbitration Moot 2017 in Wien oder Hongkong! (Anmeldung bis Ende dieses Semesters im Institut für Osteuropäisches Recht möglich). Bei Interesse gebe ich gerne genauere Information und würde das Team unterstützen.

Zur Einführung s. http://www.cisg.law.pace.edu/vis.html

A. Einführung

I. Begriff des Insolvenzrechts: R über die Durchsetzung von Forderungen gegen einen insolventen (zahlungsunfähigen) Schuldner. Häufig als Recht der "Gesamtvollstreckung" bezeichnet: doppeltes Gesamtverfahren, d.h. grds. Einbezug des Gesamtvermögens des Schuldners und grds. Einbezug aller Gläubiger.

II. Grundkategorien:

Unterscheide: Unternehmensinsolvenzen – Verbraucherinsolvenzen
Unterscheide ferner: Internationales InsolvenzR – innerstaatliches InsolvenzR

III. Rechtstatsächl. Bedeutung von Insolvenzen mit Auslandsbezug bzw. im In- und Ausland im Vergleich: s. EU-Kommissionsmitteilung 2012 und Angaben z.B. bei Creditreform.

B. Grund für die RVereinheitlichung in diesem Bereich?

I. Bedeutung des InsR als Faktor zur Bestimmung der Qualität eines Wirtschaftsstandorts, häufige internationale Dimension der Tätigkeit von Unternehmen, führt zu internationaler

Dimension auch von Unternehmenkrisen und Verfahren zur Sanierung oder Liquidation in derartigen Fällen.

II. Generelles Ziel zur Verbesserung der Justizqualität betrifft auch in den Bereich des Insolvenzrecht: Dimension Europarat etc. Auch hier stellt sich bei Vorhaben der Rechtsvereinheitlichung, ob eher einheitliche Mindeststandards gesichert werden sollten oder ob eine Vereinheitlichung mit dem Ziel der „best practices“ angestrebt werden soll. U.U. können beide Gesichtspunkte kombiniert werden.

III. Regionalpolitische Vereinheitlichungsüberlegungen bestehen auch im InsolvenzR:: s. insbes. die jüngsten Überlegung der EU, nach der Vereinheitlichung des internat. InsolvenzR durch die EuInsVO künftig auch eine Rechtsangleichung im Bereich des mat. InsR anzustreben*: s. EU-Kommissionskommunikation 2012 und -vorschlag 2014, neueste Entwicklungen im Jahr 2016 s. sog Inception Impact Assessment Report vm 3.3.2016, http://ec.europa.eu/justice/newsroom/civil/opinion/160321_de.htm*

> Arg.: Europäischer Binnenmarkt sowie einheitlicher Raum „der Freiheit, der Sicherheit und des Rechts“ sollten auch einheitliche Regeln für InsR einschließen, jdf. soweit eine binneneuropäisch-grenzüberschreitende Dimension vorliegt.

C. Rechtsquellen einheitlichen Insolvenzrechts (zugleich Erörterung von Einzelthemen)

I. Vorbemerkung: Deutsches nationales und internat. Insolvenzrecht: welche davon sind Ergebnis von „Rechtsvereinheitlichung“?

Für internat InsG gibt es solche Vorbilder (EU, Europarat), aber nicht für innerstaatl. InsR. Aber

- dt. InsO? ← teilw. int. geprägt, z.B. in den Bereichen Restschuldbefreiung (UK u.a.) und Insolvenzplan (US Bankruptcy Code)
- 335 ff InsO – weitgehend abgeleitet von EuInsVO

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II. Universelle Rechtsvereinheitlichung

1. **Staatsverträge:** derzeit existiert kein speziell der Vereinheitlichung des *innerstaatl*. InsR gewidmeter StaatsV. Für *Internationales* Insolvenzrecht besteht eine Europaratskonvention von 1990 über grenzüberschreitende InsVerfahren. Ferner einige bilaterale und regionale Abkommen.

Aber: In einigen Spezialbereichen bestehen ins-r Regelungen in anderem Gesamtzusammenhang, z.B. Unidroit Factoring-Übereinkommen.

2. ModellGesetze: werden häufig von UNCITRAL entwickelt, die auch InsolvenzR als Thema bestimmt hat, aber bisher besteht kein UNCITRAL Model Law on Insolvency im allgemeinen. UNCITRAL hat aber im Jahr 1997 UNCITRAL Model Law on Cross-Border Insolvency entwickelt und arbeitet von diesem Ausgangspunkt aus langsam an Entwicklung von Regeln auch zum innerstaatl. InsolvenzR.

Ein sehr interessantes Beispiel eines ModellG auf regionaler Ebene ist das von OHADA (Organisation für die Harmonisierung des Wirtschaftsrechts in Afrika) ausgearbeitete Modell-InsolvenzG 1998 (Neufassung 2015). Orientiert sich stark am französischen Recht.

3. „Soft law“

Verschiedene int. Organisationen (z.B. Weltbank und EBRD) befassen sich recht intensiv mit InsR, dies hat zur Entwicklung verschiedener Texte mit soft law-Charakter geführt, nicht zu einem ModellG oder einem Staatsvertrag.

a) European Bank of Reconstruction and Development (EBRD): verbindet Arbeit als Kreditgeber und Entwicklungshilfeeinrichtung.

aa) Ein erstes Ergebnis der insolvenzbezogenen Arbeiten der EBRD waren die **“Kern-prinzipien zum Insolvenzrecht” allgemein, 2001**

<u>Core Principles (EBRD 2001) for an Insolvency Law Regime</u>

1. **The ILR should at all times promote economy, transparency and speedy resolution.**
2. **The ILR should provide clear tests for the initiation of an insolvency proceeding and should require notice to be given to all known creditors of such proceeding.**
3. **The ILR should permit both bankruptcy (liquidation/wind-up) and restructuring (re-organization/workouts).**
4. **The ILR should provide for immediate interim conservatory and protective measures.**
5. **Where liquidation is appropriate, the ILR should strive to interfere as little as possible with the efficient realisation by secured creditors of their security.**
6. **The ILR should treat like parties in a like fashion**
7. **The ILR should provide for the independent review of transactions and actions by the debtor and the imposition of sanctions in case of misconduct.**
8. **Where re-organisation is appropriate, the ILR should permit new priority financing during the restructuring process.**
9. **The Insolvency Administrator should be an impartial third party.**
10. **The ILR should facilitate cross-border insolvencies.**

Die Prinzipien formulieren einen Mindeststandard für Insolvenzrechte, sind aber sehr allgemein gehalten. Zur Interpretation und Konkretisierung werden von der EBRD Erläuterungen bereitgestelt, z.B.:

Amtl. Erläuterungen zu Ziff.5:

> „Where no going concern value is to be preserved, the ILR should limit its conflict with the existing contractual rights of secured creditors. Any interference with these rights (such as the elevation of wage and tax amounts above secured claims or the requirement that the Insolvency Administrator be the sole party with the right to liquidate encumbered assets) likely increases the cost of obtaining credit. While it may be appropriate to have a mechanism by which the Insolvency Administrator can challenge the rights of secured creditors, such challenges must be completed quickly and cost-effectively. To the extent that there are residual claims after the realization of the secured creditors' security, such claims should be permitted to be treated like all other unsecured claims."

bb) Spezieller, aber für praktische Anwendung des InsR Thematik von grundlegender Bedeutung die **EBRD Insolvency Office Holder Principle**s aus dem Jahr 2007. *Grund: Die Qualität des Insolvenzverwalters ist ein Schlüsselelement für den ökonomischen Erfolg eines Insolvenzverfahren, kann u.U. Schwächen des übrigen InsolvenzR kompensieren oder auch ein im Prinzip gut geeignetes Insolvenzrecht in der Praxis zum Misserfolg führen.*

EBRD INSOLVENCY OFFICE HOLDER PRINCIPLES (2007)

EBRD PRINCIPLES IN RESPECT OF THE QUALIFICATIONS, APPOINTMENT, CONDUCT, SUPERVISION, AND REGULATION OF OFFICE HOLDERS IN INSOLVENCY CASES

Principle 1 Qualifications & Licensing Generally
Principle 2 Appointment in an Insolvency Case
Principle 3 Review of Office Holder Appointment
Principle 4 Removal, Resignation & Death of Officer Holder
Principle 5 Replacement of Office Holder
Principle 6 Standards of Professional And Commercial Conduct
Principle 7 Reporting and Supervision
Principle 8 Regulatory and Disciplinary Functions
Principle 9 Remuneration
Principle 10 Release of Office Holder
Principle 11 Insurance and Bonding
Principle 12 Code of Ethics

Konkretierende Erläuterungen z.B.

PRINCIPLE 6 – STANDARDS OF PROFESSIONAL AND COMMERCIAL CONDUCT

Standards are the most useful way of both establishing and measuring the level of performance expected of office holders.

Accordingly, the law should:

(a) by primary legislation, provide basic, fundamental standards that are critical to proper professional and commercial conduct on the part of office holders

The purpose of such basic standards is to establish basic standards of conduct for all office holders applicable in every case (for example to act honestly, to act diligently, to comply with professional standards). Then, to regulate and guide an office holder in the conduct of his/her work, a sub-set of professional standards are required. They would normally be made by secondary legislation in the form of rules or regulations, or by a recognised professional body of office holders that requires members of the professional body to comply with them.

(b) by secondary legislation (or otherwise), provide standards relating to:
• **reports** This should deal with reports on the administration of the insolvency case to creditors and a court or other relevant authority and should detail the contents of and time requirement for such reports.

cc) Hierzu bestehen eine ergänzende Anwendungsanalyse und Beratungsmaßnahmen seitens der EBRD:

„Insolvency Office Holder Assessment

The EBRD has recently completed a detailed assessment of the insolvency office holder (IOH) profession in 27 countries where it works that evaluates the profession’s state of development and performance. The aim of the Assessment was to identify any shortcomings within the existing statutory framework for IOHs that need to be addressed.

Known variously as administrators, managers, liquidators or trustees, IOHs are central figures in collective insolvency proceedings. Such proceedings often require the total or partial divestment of the debtor’s management and the appointment of an IOH to administer or liquidate the assets of the debtor. The Assessment was first piloted in 2012 in seven countries (Bosnia and Herzegovina, Latvia, Poland, Romania, Russia, Serbia and Tunisia) before being rolled out to the remaining 20 countries (Albania, Belarus, Bulgaria, Croatia, Egypt, Estonia, FYR Macedonia, Georgia, Hungary, Kazakhstan, Kosovo, Kyrgyz Republic, Lithuania, Moldova, Montenegro, Morocco, Slovak Republic, Slovenia, Turkey and Ukraine) in 2013 to 2014.

The EBRD expects to publish a full report of the Insolvency Office Holder Assessment by the end of October 2014.
An international workshop was held at the EBRD’s London headquarters on Friday 7 November.

Insolvency Sector Assessment

The Insolvency Sector Assessment is part of the EBRD's efforts to better understand legal developments in insolvency in all of its countries of operations and to encourage and provide guidance to governments, policy-makers and all those in charge of promoting new legislation for the development of insolvency related legal reform in the region.

The EBRD undertook the first Insolvency Sector Assessment in 2003 and updated it in 2006 and 2009.

The Assessment highlights the strengths of each country’s regime and points to areas where reform may be beneficial. The 2009 Assessment (link to 2009 assessment)was conducted on laws in force on 1 January 2009. However, governments have continued to reform their laws in response to the current market environment and a new Insolvency Sector Assessment is expected to be launched by the EBRD in early 2015.

The Assessment was based on the EBRD Insolvency Office Holder Principles that were developed in 2007. Results of the Assessment were presented in the form of country reports.

b) Weltbank

Sog. Weltbank-Prinzipien für effektive Insolvenzregelungen (Arbeiten werden seit 1999 betrieben, urspr. Fassung 2001)

Aktuell: 2015 PRINCIPLES FOR EFFECTIVE INSOLVENCY AND CREDITOR/DEBTOR REGIMES

„The World Bank with the assistance of international financial institutions, leading insolvency organisations and international insolvency experts has developed principles that underpin sound insolvency and creditors' rights around the world.

… The World Bank principles rely on the fundamental premise that sustainable market development requires access to affordable credit. Capital investment can only happen in an environment where parties can manage the insolvency risk associated with credit relationships.

The principles distil international best practice in the design of insolvency and creditor rights mechanisms and are used to benchmark strengths and weaknesses of existing systems. They allow flexibility in domestic policy choices and take comparative domestic laws and institutions into account.“

S. hierzu beispielsweise die World Bank Principles Preamble (Auszug):

“Effective insolvency and creditor rights systems are an important element of financial system stability. The Bank accordingly has been working with partner organizations to develop principles for insolvency and creditor rights systems. The Principles for Effective Insolvency and Creditor Rights Systems (the Principles) are a distillation of international best practice on design aspects of these systems, emphasizing contextual, integrated solutions and the policy choices involved in developing those solutions.
The Principles were originally developed in 2001 in response to a request from the international community in the wake of the financial crises in emerging markets in the late 90s. At the time, there were no internationally recognized benchmarks or standards to evaluate the effectiveness of domestic creditor rights and insolvency systems. The World Bank’s initiative began in 1999 with the constitution of an ad hoc committee of partner organizations and the assistance of leading international experts who participated in the World Bank’s Task Force and Working Groups.

The Principles themselves were vetted in a series of five regional conferences, involving officials and experts from some 75 countries, and drafts were placed on the World Bank’s website for public comment. The Bank’s Board of Directors approved the Principles in 2001 for use in connection with the joint IMF-World Bank program to develop Reports on the Observance of Standards and Codes (ROSC), subject to reviewing the experience and updating the Principles as needed. From 2001 to 2004, the Principles were used to assess country systems under the ROSC and Financial Sector Assessment Program (FSAP) in some 24 countries in all regions of the world. Assessments using the Principles have been instrumental to the Bank’s developmental and operational work and in providing assistance to member countries. These assessments have yielded a wealth of experience and enabled the

Bank to test the sufficiency of the Principles as a flexible benchmark in a wide range of country systems. In taking stock of that experience, the Bank has consulted a wide range of interested parties at the national and international level, including officials, civil society, business and financial sectors, investors, professional groups, and others.

The Principles are designed to be flexible in their application and do not offer detailed prescriptions for national systems.
The Principles embrace practices that have been widely recognized and accepted as good practices internationally. As markets evolve and competition increases globally, countries must adapt and evolve to maximize their own advantages for commerce and to attract investment by adopting laws and systems that create strong and attractive investment climates. Increasingly, businesses have become global in nature and business failures or insolvencies have had international implications, which also bring into context the importance of adopting modern practices that accommodate international business. As legal systems and business and commerce are evolutionary in nature, so too are the Principles, and we anticipate that these will continue to be reviewed going forward to take account of significant changes and developments.

Auszüge aus den Principles:

PART A. LEGAL FRAMEWORK FOR CREDITOR RIGHTS

Part B. Risk Management and Corporate Workout

PART C. LEGAL FRAMEWORK FOR INSOLVENCY

C1 Key Objectives and Policies

Though country approaches vary, effective insolvency systems should aim to:
- (i) Integrate with a country's broader legal and commercial systems;
- (ii) Maximize the value of a firm's assets and recoveries by creditors;
- (iii) Provide for the efficient liquidation of both nonviable businesses and those where liquidation is likely to produce a greater return to creditors and the reorganization of viable businesses;
- (iv) Strike a careful balance between liquidation and reorganization, allowing for easy conversion of proceedings from one procedure to another;
- (v) Provide for equitable treatment of similarly situated creditors, including similarly situated foreign and domestic creditors;
- (vi) Provide for timely, efficient, and impartial resolution of insolvencies;
- (vii) Prevent the improper use of the insolvency system;
- (viii) Prevent the premature dismemberment of a debtor's assets by individual creditors seeking quick judgments;
- (ix) Provide a transparent procedure that contains, and consistently applies, clear risk allocation rules and incentives for gathering and dispensing information;
- (x) Recognize existing creditor rights and respect the priority of claims with a predictable and established process; and
- (xi) Establish a framework for cross-border insolvencies, with recognition of foreign proceedings.

C11 Avoidable Transactions
C11.1 After the commencement of an insolvency proceeding, transactions by the debtor that are not consistent with the debtor's ordinary course of business or engaged in as part of an approved administration should be avoided (cancelled), with narrow exceptions protecting parties who lacked notice.
C11.2 Certain transactions prior to the application for or the date of commencement of the insolvency proceeding should be avoidable (cancelable), including fraudulent and preferential transfers made when the enterprise was insolvent or that rendered the enterprise insolvent.
C11.3 The suspect period, during which payments are presumed to be preferential and may be set aside, should be reasonably short in respect to general creditors to avoid disrupting normal commercial and

credit relations, but the period may be longer in the case of gifts or where the person receiving the transfer is closely related to the debtor or its owners.

PART D. IMPLEMENTATION: INSTITUTIONAL & REGULATORY FRAMEWORKS

Ergänzend hat die Weltbank sog. Reports on the Observance of Standards and Codes ("ROSC") entwickelt.

c) UNCITRAL: Legislative Guide on Insolvency Law 2004-2013

UNCITRAL hat ebenfalls Arbeiten zur Entwicklung internationaler Standards im InsR aufgenommen. Diese Arbeiten zielen – anders als EBRD und Weltbank – nicht auf „Prinzipien" und derzeit auch nicht auf ein ModellG (vielleicht weil das Thema zu weit ist und noch keine international anerkannte ausreichende gemeinsame Basis besteht). Statt dessen hat UNCITRAL einen noch flexibleren Ansatz gewählt, die Entwicklung eines allerdings sehr detaillierten *Leitfadens für Gesetzgeber.*

a) Überblick

Kern: Teile 1 und 2, 286 Seiten mit 1998 Empfehlungen. Stellen die Insolvenzrechte der Welt (Unternehmensinsolvenzen) knapp vergleichend dar, sehr gut systematisch aufgebaut. Zunächst werden die verschiedenen in der Welt vertretenen Lösungsansätze skizziert, dann wird versucht, daraus eine Synthese mit Empfehlungen und Alternativen zu entwickeln. Geht z.T. sehr ins Detail (z.B. im internationalen Insolvenzrecht).

bb) Struktur

Part one
DESIGNING THE KEY OBJECTIVES AND STRUCTURE OF AN EFFECTIVE AND EFFICIENT INSOLVENCY LAW

cc) Einzelregelungen zur Betrachtung

aaa) Grundlagen

Recommendations 1-5 (paras. 4-14)

1. In order to establish and develop an effective insolvency law, the following key objectives should be considered:
(a) Provide certainty in the market to promote economic stability and growth;
(b) Maximize value of assets;Strike a balance between liquidation and reorganization;
(c) Ensure equitable treatment of similarly situated creditors;
(d) Provide for timely, efficient and impartial resolution of insolvency;
(f) Preserve the insolvency estate to allow equitable distribution to creditors;
(g) Ensure a transparent and predictable insolvency law that contains incentives for gathering and dispensing information; and
(h) Recognize existing creditors rights and establish clear rules for ranking of priority claims.
2. The insolvency law should include provisions addressing both reorganization and liquidation of a debtor.
3. The insolvency law should recognize rights and claims arising under law other than the insolvency law, whether domestic or foreign, except to the extent of any express limitation set forth in the insolvency law.
4. The insolvency law should specify that where a security interest is effective and enforceable under law other than the insolvency law, it will be recognized in insolvency proceedings as effective and enforceable.
5. The insolvency law should include a modern, harmonized and fair framework to address effectively instances of cross-border insolvency. Enactment of the UNCITRAL Model Law on Cross-Border Insolvency is recommended.

bbb) Persönl. Anwendungsbereich des Insolvenzrechts; *zugleich betrachte Aufbau und Argumentsart der Regelungen.*

I. Application and commencement

A. Eligibility and jurisdiction

1. Eligibility: debtors to be covered by an insolvency law

1. An important threshold issue in designing an insolvency law focused on debtors engaged in economic activities (whether or not they are conducted for profit) is determining and clearly defining which debtors will be subject to the law. To the extent that any debtor is excluded from the law, it will not enjoy the protections offered by the law, nor will it be subject to the discipline of the law. This argues in favour of an all-inclusive approach to the design of an insolvency law, with limited exceptions. The design of eligibility provisions for an insolvency law raises two basic questions. Firstly, whether the law should distinguish between debtors who are natural persons and debtors that are some form of limited liability enterprise or corporation or other legal person, each of which will raise not only different policy considerations, but also considerations concerning social and other attitudes. Secondly, the types of debtor, if any, that should be excluded from the application of the law.

2. States adopt different approaches to defining the scope of application of their insolvency laws. Some insolvency laws apply to all debtors with certain specified exceptions, such as those discussed below. Other States distinguish between natural person debtors and juridical or legal person debtors and provide different insolvency laws for each. A further approach distinguishes between legal and natural persons on the basis of their engagement in economic (or consumer) activities. Some of these laws address the insolvency of "merchants", which are defined by reference to engagement in economic activities as an ordinary occupation, or companies incorporated in accordance with commercial laws and other entities that regularly undertake economic activities. Some laws also include different procedures based on levels of indebtedness and a number of States have developed special insolvency regimes for different sectors of the economy, in particular the agricultural sector.
…

(a) Natural persons engaged in economic activities

7. The Legislative Guide focuses upon the conduct of economic activities by both legal and natural persons, irrespective of the legal structure through which those activities are conducted and whether or not they are conducted for profit. It identifies those issues where additional or different provisions will be required if natural person debtors are included in the insolvency law.

(b) State-owned enterprises

8. An insolvency law can apply to all types of debtor engaged in economic activities, both private and state-owned, especially those state-owned enterprises which compete in the market place as distinct economic or business operations and otherwise have the same commercial and economic interests as privately-owned businesses.

ccc) Beispiel: Aussagen zur Insolvenzanfechtung *(vgl. auch mit Weltbank-Prinzipien, EBRD, Principles of European Insolvency Law)*

F. Avoidance proceedings

1. Introduction

148. Insolvency proceedings (both liquidation and reorganization) may commence long after a debtor first becomes aware that such an outcome cannot be avoided. In that intervening period, there may be significant opportunities for the debtor to attempt to hide assets from creditors, incur artificial liabilities, make donations or gifts to relatives and friends or pay certain creditors to the exclusion of others. There may also be opportunities for creditors to initiate strategic action to place themselves in an advantageous position. The result of such activities, in terms of the eventual insolvency proceedings, generally disadvantages ordinary unsecured creditors who were not party to such actions and do not have the protection of a security interest.

149. The use of the word "transaction" in this section is intended to refer generally to the wide range of legal acts by which assets may be disposed of or obligations incurred, including by way of transfer, payment, encumbrance,guarantee, loan or release, and may include a composite series of such transactions. …

Recommendations 87-99

Purpose of legislative provisions

The purpose of avoidance provisions is:

(a) To reconstitute the integrity of the estate and ensure the equitable treatment of creditors;
(b) To provide certainty for third parties by establishing clear rules for the circumstances in which transactions occurring prior to the commencement of insolvency proceedings involving the debtor or the debtor's property may be considered injurious and therefore subject to avoidance;
(c) To enable the commencement of proceedings to avoid those transactions; and
(d) To facilitate the recovery of money or assets from persons involved in transactions that have been avoided.

Contents of legislative provisions

Avoidable transactions (paras. 170-179)

> 87. The insolvency law should include provisions that apply retroactively and are designed to overturn transactions, involving the debtor or assets of the estate, and that have the effect of either reducing the value of the estate or upsetting the principle of equitable treatment of creditors. The insolvency law should specify the following types of transaction as avoidable:
> (a) Transactions intended to defeat, delay or hinder the ability of creditors to collect claims where the effect of the transaction was to put assets beyond the reach of creditors or potential creditors or to otherwise prejudice the interests of creditors;
> (b) Transactions where a transfer of an interest in property or the undertaking of an obligation by the debtor was a gift or was made in exchange for a nominal or less than equivalent value or for inadequate value that occurred at a time when the debtor was insolvent or as a result of which the debtor became insolvent (undervalued transactions); and
> (c) Transactions involving creditors where a creditor obtained, or received the benefit of, more than its pro rata share of the debtor's assets that occurred at a time when the debtor was insolvent (preferential transactions).

…

Bitte analysieren Sie die Struktur dieses Texts? Ist die Darstellung rechtsvergleichend „neutral" oder gibt sie eine inhaltiche Präferenz zu erkennen? Welche Gestaltungsräume bleiben den Staaten?

III. EU-Recht

EU-PrimärR, z.B. 18 AEUV (allg. DiskrVerbot), Grundfreiheiten: gelten auch für InsR

1. Internat. InsRR: wichtig insbes. EuInsVO 2000, wird z.Zt. überarbeitet. Enthält z.T. Definitionen, die auch für das innerstaatliche Insolvenzrecht verwendet werden können; ebenso auch Definition von „Themen" des InsolvenzR, die bei RAngleichung eine Rolle spielen können.

2. Angleichung des innerstaatl. InsR:

a) Einzelne Regelungen in sekundärem InsR, z.B. bei Betriebsübergang und Massenentlassungen.

b) Vorüberlegungen für EU-Rechtsangleichung im InsR

aa) Erste Aktivitäten:

- Vorläufer: Justizminister im Europarat verabschieden in den 90er Jahren des letzten Jahrtausends Resolution, in der zur Angleichung des InsR aufgerufen wird

- 1999 – 2003 Akademischer Text von **"Principles of European Insolvency Law"**

§ 1 Insolvency proceeding
§ 2 Institutions and participants
§ 3 Effects of the opening of the proceeding
§ 4 Management of the assets
§ 5 Obligations incurred by, and fees of, the administrator
§ 6 Treatment of contracts
§ 7 Position of employees
§ 8 Reversal of juridical acts

§ 9 Securityrights and set-off
§ 10 Submission and admission of insolvency claims
§ 11 Reorganization
§ 12 Liquidation
§ 13 Closure of the proceeding
§ 14 Debtor in possession

c) Aufnahme dieser Anregungen durch die EU-Organe

aa) Das EU-Parlamenent rief im November 2011 die Kommission zu einer Rechtsangleichung im Bereich des UnternehmensinsolvenzR auf,

bb) Mitteilung der EU-Kommission and das EP und den Rat vom 12.12.2012 „A new European approach to business failure and insolvency“ /* COM/2012/0742 final */

cc) COMMISSION RECOMMENDATION of 12.3.2014 on a new approach to business failure and insolvency

dd) Neue Entwicklungen im Jahr 2016 führen dieses Vorhaben fort.

IV. Andere regionale Rechtsvereinheitlichung im Insolvenz

Einige Ansätze, aber ohne großen Erfolg, im postsowjet. Raum durch die GUS.

Interessant aber **OHADA Uniform Insolvency Act 1998 mit Neufassung von 2015:**

OHADA Acte uniforme portant organisation des procédures collectives d’apurement du passif

Besteht aus 258 Artikeln, ziemlich detailliert, regelt grds. nur die Insolvenz von unternehmerisch tätigen Schuldner; enge Verwandtschaft mit dem französischen Recht. Struktur:

Titre 1 - Règlement préventif (5 -)
Titre 2 - Redressement judiciaire et liquidation des biens (25 – 193)
Titre 3 - Faillite personnelle et réhabilitation (194 -)
Titre 4 - Voies de recours en matière de redressement judiciaire et de liquidation des biens (216 -)
Titre 5 - Banqueroute et autres infractions (226 -)
Titre 6 - Procédures collectives internationales (247 – 256)
Titre 7 - Dispositions finales (257 – 258)

D. Weiterführende Literatur: s. z.B. International Insolvency Review, INSOL International, Uncitral-Webseite etc.