A Statutory Procedure for Restructuring Debts of Sovereign States

The Sovereign Debt Restructuring has become a world-wide recognized problem with the upcoming of the Argentinian crisis. Proposals for solving this problem can be subdivided into contractual and statutory approaches. The present author argues in favour of the latter – despite the fact that, after finishing the manuscript, the International Monetary Fund (IMF) has announced that the contractual approach is too powerful to overcome.

I. As an Orientation

Thanks to the initiative of the IMF's First Deputy Managing Director, Anne Krueger, in November 2001, the discussion about introducing a transparent and predictable proceeding for the solution of sovereign debt crises has been elevated from church and NGO demands to a general political issue. The most prominent model that has been forwarded so far is the Sovereign Debt Restructuring Mechanism (SDRM) of the IMF. It follows what is nowadays called a statutory approach as opposed to the contractual approach, which appears to be favoured by numerous institutions such as the private investors, the US Treasury, and quite a number of countries that are actual candidates for a state insolvency proceeding of whatever kind so ever. A short description of those two approaches (and a few more) might serve as an orientation.

1. Contractual Approach

The proponents of this approach try to keep the procedural aspects in the course of a state's debt restructuring attempts as minimal as possible. They do so by relying on the so called „Collective Action Clauses“ (CAC) that are to be inserted in bonds issued by the state at hand. They provide that under given circumstances the holders of the respective bonds submit themselves to a majority decision of all creditors of such bond – primarily with respect to the consent to a certain percentage of debt reduction. This shall in particular overcome the notorious problem of opposing minorities.

The CAC's, thus, are targeting that what nowadays usually – e.g. in case of Argentina – form the biggest block of debts of financially troubled countries. This phenomenon contrasts with times not far ago – some 10 to 15 years – when banks and other states had been the main supplier of foreign money. To the degree, that they have withdrawn from lending money to states (and, thus, the importance of both the Paris Club and the London Club has been reduced) it has become more and more popular for those states to turn directly to the capital markets and to receive money there by means of bonds. Therefore, bond holders and other private investors (such as, e.g., insurance companies) are nowadays the typical lenders; they are the ones which, according to the proponents of the contractual approach, apparently are supposed to bear the main burden of the debt restructuring.

2. Statutory Approach

The statutory approach attempts to solve the problem of an insolvent state on a broader basis than just the amendment of contracts. It resembles in many respects the insolvency proceeding known from the private law – and here, in particular the reorganisation proceeding or „Planverfahren“, as it is called in German terminology and as it is modelled after the US chapter 11 proceeding. It does so by creating a legal framework which offers the stage on which negotiations can be led between the stakeholders and results be achieved in a fair and transparent manner. Such a framework not only exercises a disciplining impact on both the debtor in its borrowing policy and the creditor in its lending strategy; it, moreover, enables predictability by allowing ex ante calculations, whereas the present way of handling debt crises offers only ex post hope (or power respectively) for debt restructuring.

It has already been said that the most prominent representative of the statutory approach is the IMF with its SDRM. It is statutory in that it shall be incorporated into the IMF's Articles which obliges all members to take the necessary (legislative) steps to give these rules effect. The present version is the result of a number of essential changes from a clearly IMF dominated and driven proceeding in the beginning to a now quite well balanced scheme in which the IMF tries to keep itself out of the mechanism as much as possible. Suffice it to mention here that such a procedural control shall be in the hands of a special type of court, or as the IMF phrases: a Dispute Resolution Forum (DRF).

* Der Autor ist Inhaber des Lehrstuhls für Bürgerliches Recht, deutsches und internationales Zivilprozessrecht und Römisches Recht. Mehr über ihn erfahren Sie auf S. VIII.
1 Details need not be given here since they have already been written down by the present author in various publications as, e.g., in Werptsammlungen (WM) 2002, p. 725 seq.; Zeitschrift für Rechtspolitik (ZRP) 2002, p. 383 seq.; Österreichische Juristenschrift (ÖZ) 2002, p. 701 seq. See also 50 American Journal of Comparative Law p. 531 seq. (2002).
3. Others

Whereas the Pope exclaimed the year 2000 as the general year of forgiveness, the NGOs favoured ad hoc solutions – i.e. each debt crisis of a state shall be dealt with and solved through a type of arbitration proceeding where each side – the debtor on the one and the creditors on the other – chooses two judges who then elect a fifth one.

Another proposal has just been forwarded by the Bank of France – more specific: its Governor Mr. Jean-Claude Trichet. It claims to be not more than a transitional solution until a final one has been achieved. Its main feature is a more or less elaborated Code of Good Conduct to which all stakeholders shall volunteer to stick in case of a state's crisis.

4. Evaluation

a) Contractual Approach

The private investors tend to favour the contractual approach because the statutory approach would allegedly exercise too deep a cut into their existing rights. Of course, thereby they ignore that, under the present circumstances, such cuts are not less and that they are by no means calculable. Thus, it appears that the real reason for opposing the statutory approach is the feared loss of power – as each holder of rights (and particularly a secured creditor) has and exercises power on the obliged. Moreover, the contractual approach has difficulties in guaranteeing inter-creditor equity as each CAC applies by definition just to the type of contract to which it belongs. And finally, in its concentration on bonds, this approach ignores potential changes in lending practices: Who knows at this point of time if not states and banks will re-enter the stage of lending? The fact that they have left it some years ago does not mean that they will never come back again. If that would happen, the contractual approach would be of no use if it were introduced by then.

b) Other Approaches

The Church proposals and those of the NGOs do not appear to be very realistic – speaking in terms of politics and law. Even if, following the Old Testament's Jewish tradition of regular debt forgiving were followed, and even if there do exist individual examples for ad hoc solutions, on a general scale those proposals are unlikely to be acceptable. Not only that the world's economy is not based on that old Jewish rule, but also ad hoc solutions, in the long term, do not provide the necessary predictability. Moreover, the election mechanism of the administrators appears to be somewhat idealistic: How shall the debtor's judges be selected? By election? How long does this take? Who has the right to (s)elect? And on the creditor's side! Who are „the creditors“? Usually an enormous group of persons and institutions who represent as many disparate interests as they are in number. Given this fact, how and when shall they agree on two judges?

c) Statutory Approach

Under these circumstances, it is apparent that the preferable approach is the statutory one. This, however, does not mean that the IMF's SDRM were the golden solution, so to speak. It is not – for a few reasons: The most important one is perception. Even though the present Managing Director of the IMF is working hard on improvements as how to the Fund is (or should be) seen in the world, there will always be a bitter aftertaste when the very institution which, by means of its regular consultations, accompanies closely a state on its path into its financial crisis is the one which offers the solution through the SDRM once the unsustainability of debts has indeed come into existence.

Moreover, the IMF frees itself the SDRM in order to guarantee itself full satisfaction of its outstanding claims. This, however, is completely unbearable only on first sight. A closer look reveals that such a legislative „self-service“ has been (and in many countries still is) an undisputed feature of private insolvency laws. Here, the state always was not only a creditor (as to taxes and other public revenues); at the same time, it was also the law maker which provided for (and paid) the judges and privileged itself by means of a better status within the proceeding than the other creditors of equal rank. But a still closer look shows that this comparison does not carry too far in the case of the IMF: First of all, it is not the sovereign that rules over subjects; therefore, secondly, this „self-service“ invites other multilateral creditors – including the Paris Club – to claim the same privileged status (which they are in fact to receive); and this leads, thirdly, to the proceeding's concentration on private investors and, thus, shares the flaw of the present contractual approach.

If, thereby, inter-creditor equity is undermined, the proceeding breaches fundamental requirements of the rule of law – which, be it reminded, the IMF outside the SDRM context is eager to see established and followed in its member states all over the world.

II. Another Statutory Approach

To the present author's opinion, the flaws of the IMF's proposal can be avoided and the advantages of the statutory approach can be realized. In earlier publications, this approach has already been outlined – but in sight of the fact that the task is so young (the private law insolvency regime needed virtually millennia to reach its present degree of sophistication) and that its complexity is so immense, it cannot surprise that modifications of this approach make an amended version of this concept desirable.

1. Main Task: Enforced Community (Zwangsvermögenschaft)

Seen from a legal point of view, the main task or challenge for the creation of the new instrument is to establish what German scholarship calls a „Zwangsvermögenschaft“ and what can be translated as enforced community. This term describes what is probably the peculiarity of any insolvency law in the private law area – namely the inclusion of basically all the debtor's creditors into the proceeding; they are affected if they want it or not, if they know about the proceeding or not, if they are domestic or foreign, or if they are private law persons or states.

The contractual approach tries to reach such enforced community by means of contract clauses – and restricts, thus, its

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3. Its nine rules resemble quite closely to the INSOL's proposal for Out of Court settlements as reprinted, e.g., in WM 2002, 778.
4. See fn 1.
5. J. P. Morgan offers for this problem a solution which, however, is rather complicated and dependent of initial funding which it is not explained where it shall come from.
6. Supra at 1.4.7.
7. The present author owes numerous new insights to the seminar which the IMF had organized in late October 2002 with some „expert advisors“.
applicability automatically to only a portion of creditors; cf. supra at 1.4.a. What has been called supra „other approaches“ neglects this legal requirement completely and leaves, thus, the highly important question for inter-creditor equity unanswered. In contrast, the IMF’s SDRM has the potential for an enforced community but pushes it aside for political or fiscal reasons.

Another solution to create an enforced community is to have the United Nations (UN) draft a model law that deals in detail with the insolvency of a state8. It is throughout accepted that any state of this world has the power and the right to create such community in case that one of its subjects goes bankrupt; this is also true in case that such subject is itself a public law entity—a municipality or the like. The next logical step is that an enforced community would also be established if the respective state has its own insolvent regulation. In order to avoid unjust individual legislations, however, it is indispensable that there is just one pattern which all state insolvency laws have to follow strictly. And this would be the said model law which could be implemented by means of the IMF's and the World Bank's conditionality.

This solution has the advantage of avoiding the IMF's SDRM main flaw of a collision of interests; the UN usually is not a creditor to the countries here in question. This „separation of powers“, however, does not necessarily mean that the IMF's and World Bank's role in a state insolvency proceeding were automatically reduced to a mere creditor position like, e.g., any private bond holder. Not only, that the informations pooled in these institutions about the economic situation of the states are indispensable for any effective insolvency proceeding, they are also to be treated separately—not because they are the „law makers“ but because (and to the degree that) they are lenders of last resort. Since what they do in this respect would be qualified in a private law surrounding as „Sanierungskredit“ or credit given for reorganisation purposes. There are many examples in existing insolvency laws for privileging such credits.

Another advantage of the present model law proposal is that it develops full applicability under all patterns of lending behaviour. It avoids, thus, the potential temporarity of the other existing proposals.

2. Details of the Model Law

Be it said again right at the outset that the following descriptions do not claim to offer a final solution for all problems resulting from drafting such model law. For such a claim the time is just not yet ripe and the task too new and all too complex. Instead, the present author intends no more than to offer some considerations which appear to be of some importance for mastering the task. They do not cover the whole spectrum of issues either that need to be addressed in a model law.

a) Supervisor of the Proceeding

Even though it appears to be a preferable general rule of thumb in this context, to let a state insolvency proceeding (SIP) interfere as few as possible with the current affairs of such state, the institution of a neutral person could serve as a trust creating measure. Its task being mainly an organisational and monitoring one, this person would be the addresssee for all procedural issues. The need for such an institution is not so obvious in a case like the Argentine one since this country has due to its history and still existing position quite another standing within the international community than smaller and ever poorer states such as, e.g., Uganda or Ecuador. If their insolvency were at stake, the neutral „Supervisor of the proceeding“ would serve as a sort of buffer between the parties, which cools off the discussions and canalizes them into the given procedural forms.

As a matter of fact, it would be ideal to have a separate pool of such „Supervisors of the proceeding“. This would be associated with a supranational institution such as, again, the UN or, even better, the International Court of Justice. But since one has to bear in mind, at least at the present times9, to keep the costs of such proceeding as low as possible the creation of such a pool cannot be separated from the equally necessary pool of judges10. Thus, the indispensable pool of judges could serve at the same time as a pool of those Supervisors.

b) Commencement Requirements

The opening requirements for a SIP are to be subdivided into a formal part and a substantive one.

aa) Formal

Here it needs to be addressed who qualifies for the initiation of the proceeding. There is no question that this option has to be given to the debtor state itself; but shall such right also be with the creditors? Seen from the overall advantage of any existing effective insolvency law—namely its disciplining function on all parties at stake—it would be well advisable to assign the right to apply for a commencement to the creditors as well11. Since then both sides had the bargaining chip at the pre-proceeding settlement negotiations to pull the trigger.

However, the opening of the proceeding implies such a policy change within the debtor state and it is closely connected with so many internal as well as external affairs of that state that the complexity of such a step cannot possibly be overseen by any creditor. The right to apply for initiating would, thus, invite them to abuse which could cause tremendous harm to the country in question. Therefore, the initiating right should be left alone with the debtor state.

It should be noted by way of comparison that, in private law insolvency legislation, many jurisdictions leave the initiative for opening a reorganisation proceeding to the debtor alone. This comparison stands to reason since, as a matter of fact, the only possible form of the state insolvency proceeding is a plan proceeding: i.e. a proceeding in which the stakeholders discuss and vote on a plan how to restructure the debts (and possibly also the financial and economic affairs) of the debtor state.

Given this fact, it is only just to claim from a debtor state that wants to trigger a proceeding that, at the time of the application, it comes forward with a detailed plan which, then, serves as the basis for discussions with the creditors within

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8 Since UNCITRAL has already some experience with drafting model laws about insolvency regimes, this subdivision of the UN is something like the first choice for the task.
9 In later times, the community of states might see it as one of its task to preserve the complete infrastructure for these insolvency proceedings; paid by contributions from all states.
10 See below at II.
11 If not all creditors, the right to apply could also be given just to the IMF or the World Bank as lenders of last resort. This would replace—or amend—the existing powers of the conditionality.
the proceeding. It would be one of the tasks of the „Supervisor of the proceeding“ to check on a more general level the feasibility of the plan in order to prevent abuse of the proceeding through the applicant. Here as well as at other procedural steps the sanction for non-compliance or bad-compliance could be the exclusion of access to the proceeding for a given number of years – e.g. seven or so.

bb) Substantive

When it comes to defining the reason for opening, the comparison with the private law insolvency regime does not carry very far. Since, strictly speaking, a state is insolvent only if the last of its tax paying citizens is subject to an insolvency proceeding. Therefore, the IMF relies on the concept of „insustainability of debts“; whereby it would base the judgement about sustainability or not on the enormous fundus of informations gathered in the due course of its work. Since this fundus is unique, it appears that any type of proceeding has to rely on these informations. This implies that the „Supervisor of the proceeding“, in order to verify the fulfilment of the opening requirements, has to cooperate with the IMF in this respect. He would be dependent on the IMF’s information.

Another possible solution would be to leave the reason for opening undefined – or even to skip it completely – and to have instead a somewhat broad rule that forbids abusive application. It could, then, be left to developing „Fallgruppen“ (groups of cases) over the time which concretizes the vagueness of such term with each case. The disadvantage of this approach is, of course, that it starts with uncertainty. However, at the present – pre-SDRM or pre-insolvency proceeding – time the uncertainty is by no means less as to the question whether or not (and to what degree) an overindebted state receives relief from, e.g., the Paris Club.

c) Effects of Opening

Once the SIP has been opened the question arises to what degree this has an effect on the debtor and its creditors. The answer to this fundamental question encompasses many facets out of which the most important ones are selected below.

aa) Claims Covered

The IMF specifies the claims that shall be affected by its SDRM in an appropriate three step approach: by designating the debtor, the type of claims, and the creditor.

The debtor in question is not just the state as such but also those immediate state institutions which are not eligible for an insolvency proceeding under the respective private law insolvency regime, e.g. the national Bank of that debtor. This excludes also institutions and corporations which are „too big to fail“; i.e. entities which, for factual political or other reasons, will not be subjected to the private law insolvency proceeding. It is the task of exactly the private law reorganisation proceeding to take care of these entities – and not that of a state insolvency proceeding. In addition, state subdivisions such as regions, Länder, provinces or the like are to be excluded.

As to the type of claims, the IMF concentrates just on contractual obligations. This excludes primarily tort claims. This gives rise to the question whether or not, e.g., reparation payments after a war can be subjected to this proceeding. The answer is probably „no“ since it is hardly a contractual agreement when a winner imposes such payment obligations on the country that has lost the war. On the other hand, particularly the German post world war II-experience shows that these obligations can (and maybe: shall) have a strangulating effect. Accordingly, large parts of them had been forgiven 1953 by the „Lönder Schuldendakonnung“ and enabled, thus, the German „Wirtschaftswunder“

bb) Stay on Creditors’ Actions?

In private law insolvency legislation it is a standard feature of almost any law that it has some effect on creditors’ action once the proceeding has been opened. The most prominent effect is a more or less all-encompassing automatic stay. This means that all creditors are barred from pursuing their own individual interests; instead, they have to submit themselves to the common interest of achieving the best possible result from the insolvency proceeding. This effect serves as an equity measure since each creditor can rely on the fact that no other co-creditor will, from now on, receive unjust preferential treatment.

But there are other methods as well; e.g., a „claw-back“ rule which nullifies certain creditors’ actions ex post in case that an insolvency proceeding has been commenced; or a „hotchpot rule“ which leaves individual collections with the respective creditors but excludes them from any distribution until the other creditors have received as much as the individual creditor by means of his individual collection effort.

The automatic stay often serves as an attraction for debtors in suchway that it allows to interrupt creditor actions. Therefore, a careful balance has to be found between the reason to open a proceeding (see supra at II.2.b bb) and the effect of

12 One might think also about formulating certain minimum requirements for the contents of such plan – both with respect to formal as well as substantiative issues.
13 In which intensity this has to be done, needs not be discussed here. Suffice it to say that there are many variations thinkable.
such opening. If the reason would be unsustainability of debts, the feature of an automatic stay would be appropriate. The debtor would be prevented from satisfying individual claims and the creditors from pursuing and enforcing their interests. But if this would appear to be too harsh a measure, one could think also about introducing a stay that does not start automatically but only upon request of the debtor and subsequent approval of the „Supervisor of the proceeding“. A further tool of softening (if necessary at all) the stay would be to terminate it to a given period of time — e.g., six or twelve months.

The same considerations can be applied to a claw-back rule whereas the hotpot rule gives incentives to very rudely seeking 100% satisfaction before the opening of the proceeding; insofar it does not exclude an „unhealthy“ run to the assets in times of a growing deterioration of a debtor state’s financial and economic situation. Thus, it accelerates such developments.

But if there is no reason to open required and if the commencement of a proceeding is dependent only on not being abusive, any automatism of a stay appears to be giving too much power into the hands of the debtor. Therefore, in such cases a stay or a claw-back must necessarily be subject to approval of the „Supervisor of the proceeding“.

cc) Creditors’ Organisation

It is quite clear that effectiveness of a SIP requires a drastic reduction of the generally enormous amount of creditors. Thus, there should be a form of representative body of — and for — the creditors. Be it reminded that in some private law insolvency laws — e.g., in France and Austria — this reduction leads to only one person or institution, the creditor’s representative. This, however, for reasons of perception and acceptation, cannot be done in case of a state’s debt restructuring. Therefore, a limited number of creditors mirroring the whole of the creditors in a representative manner should be selected by the „Supervisor of the proceeding“. Upon justified request this group could be increased up or reduced. The decision would have to be with the Court; cf. below at II.2.c.

This Committee’s task is supporting the „Supervisor of the proceeding“ at his work and to lead the discussions with the debtor state about its rescuing plan. Further tasks might emerge in the course of time.

d) Duties of the Debtor

The main duties of the debtor are to prevent all unjustified acts and transactions that have a detrimental effect on the creditors and their right to be satisfied and to present a feasible and realistic plan for the rescue of this state. The sanctions for any misbehaviour should be as clear and predictable as possible, they could range from privileging a maltreated group of creditors to terminating the proceeding automatically and barring a re-application for a certain number of years.

aa) General rules

Structuring the proceeding requires rules about verification of claims, plan discussion, group formation, voting and consent requirements. It has been mentioned already that the discussions should be led by the debtor with the creditors’ committee, and the „Supervisor of the proceeding“ should always be present. The groups, of course, have to be formed on the basis of objective criteria and the voting should be done within each group. Presently a 75% consent appears to be the throughout accepted majority requirement.

bb) Costs

The costs of the particular proceeding have to be borne by the debtor. This would include, e.g., the participation costs of each member of the creditors’ committee and also those of the „Supervisor of the proceeding“. However, in the latter case it is quite clear that this payment duty of the debtor state does not include the general salary of that „Supervisor“. Since then the independence of this person would possibly be imperilled — or at least this would be the perception.

Therefore, the question arises of who should pay those „Supervisors“ and the judges of the particular court. In its own proposal, the IMF is willing to bear these costs. If the pool of „Supervisors“ and judges were not separated, no additional costs would emerge for this institution. However, it is questionable if the IMF is still willing to support such pool financially if the SDRM is taken out of its hands. Even though this is to be hoped for, it is at least not totally self-evident that it will do so. Then, it might be possible that the UN steps in — or even the World Bank which declares its most ambitious task to fight poverty. Like any effective private law insolvency regime, the state insolvency proceeding serves exactly this purpose as well.

e) Court

For disputes arising particularly in the context of the verification of claims (but maybe also in a few more cases), an adjudicating body is necessary. This could be left to the courts which happen to have jurisdiction in every particular case pursuant to the applicable conflict of law rules. However, like the general law of any arbitration court, such a ruling would prevent the development of specific expertise. For the sake of predictability, it is, therefore, to be wished that there is a rather small pool of judges which consists of persons not only with outstanding insolvency law experience but also with a judicial background. Since then, this group will soon bring forward quite a uniform body of jurisdiction which helps to swiftly develop and specify the rules of the model law.

Even though it would be appropriate to have a special (insolvency) chamber established at the International Court of Justice (ICJ), it appears to be unrealistic to plan for such a solution. However, the IMF provides in its proposal for the creation of the above-mentioned Dispute Resolution Forum (DRF). This part of the IMF paper is extraordinarily well drafted so that almost nothing needs to be changed.

The right to nominate the selection panel would not (necessarily) be with the Managing Director of the IMF but with the Secretary General of the UN. The members of that panel have the sole duty to (select some 12 to 16 judges who form the pool of judges and Supervisors of the proceeding. There should be no more than two judges from the same country as there should be a general sense for diversity within this pool.

The pool members follow their respective professions but have to be available when the president of the court — who, at

15 And here in particular, experience with international insolvency cases.
16 See IMF (fn 2), p. 56 seq. What is written in the text above is just a brief outline from the IMF’s paper; see also Paulus, Die Rolle des Richters in einem künftigen SDRM, in: FS Kirchhof (to appear fall 2003).
the beginning, has to be elected out of the pool and who is the only one who works in his position full-time — calls them to adjudication for a specific case. There could be three judges for each case and one Supervisor. They decide on the basis of the law which is applicable to each claim in question. Their decisions have generally binding effect.

III. Resume

In engaging the UN for drafting the model law, the preceding proposal avoids the main flaw of the IMF paper. Nevertheless, both proposals share the same — statutory — approach and have, therefore, the advantage as against the contractual approach of greater transparency and predictability of the proceeding. Of course, once established the statutory approach changes the „rules of the game“ to a considerable degree. However, the globalization meanwhile has reached a stage which forbids maintaining blindly the old distribution of powers. New paths towards a fairer mutual treatment have to be discovered. The model law appears to be one of them.

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Internationales Bereicherungsrecht zwischen EGBGB-Reform und „Rom II“


Der Beitrag berichtet einerseits von den ersten Erfahrungen mit der Kodifikation des Internationalen Bereicherungsrechts in Deutschland und gibt andererseits einen Überblick über die Änderungen, die durch eine Verabschiedung von „Rom II“ eintreten würden, wenn die Verordnung dem nun vorliegenden Entwurf entspräche.

I. Kodifikationen des Internationalen Bereicherungsrechts

Das Internationale Bereicherungsrecht stand jahrzehntelang nicht im Zentrum der kollisionsrechtlichen Diskussion. Das änderte sich auch nicht durch die umfassende Novelle des EGGBGB im Jahr 1986. Erst im vergangenen Jahrzehnt wur- den die ersten beiden Monographien 1 in Deutschland veröffentlicht. Im Jahr 1999 entschloss sich dann der Gesetzgeber zu einer Kodifikation des IPR für die außervertraglichen Schuldverhältnisse und das Sachenrecht, darunter auch für das Bereicherungsrecht. Die Neuregelung kodifizierte im Wesentlichen die zuvor herrschende Meinung. 2


II. Leistungskondiktion

Der deutsche Gesetzgeber ist bei der Kodifikation des Internationalen Bereicherungsrechts für die Leistungskondiktion der allgemeinen Meinung in Deutschland gefolgt, nach der die Leistungskondiktion dem Recht des Rechtsverhältnisses unterliegt, auf das die Leistung bezogen ist (sog. „akzessorische Anknüpfung“). 5 Diese Anknüpfung war auch schon in „Rom I“ (im Folgenden entsprechend dem in Deutschland üblichen Sprachgebrauch „EUV“ genannt) angelegt: Art. 10 Abs. 1 lit. e EUV 6 sah und sieht die ‚vertragsakzessorische Anknüpfung‘ für die Rechtsfolgen einer Vertragsnichtigkeit vor, und hierzu zählen auch bereicherungsrechtliche Ausgleichsansprüche. 7

5 Nachweise zu verkodifikatorischen Situationen bei Busse (Fr. 1, S. 90 - 91); Staudinger v. Hoffmann/Fuchs, BGB, Art. 38 - 42 EGBGB, Neubearbeitung 2001, Art. 38 Rdnr. 6.
6 Die Bestimmung ist im Vereinigten Königreich und in Italien nicht anwendbar, da diese den — nach Art. 22 Abs. 1 lit. b EUV möglichen — Vor- behalt erklärt haben.
7 So beispielsweise OLG Frankfurt a. M., WM 1996, 2107, 2109, zu der diesen übernehmenden Bestimmung des Art. 32 Abs. 1 Nr. 5 EGBGB.