Hans-Georg Koppensteiner, Kollisions- und Gesellschaftsrechtliche Aspekte unter besonderer Berücksichtigung der Entziehung von Mitgliedschaftsrechten, in: Enteignungs- oder Nationalisierungsmassnahmen gegen auslaendische Kapitalgesellschaften, Berichte DGVR Heft 13, Karlsruhe 1974

Summary

Professor Dr. Koppensteiner

Expropriation or Nationalisation Measures Concerning Foreign Companies

Aspects of Conflict of Laws and of Company Law with Special Reference to the Expropriation of the Interests of Shareholders.

I.

Determinants in Positive Law

1. Positive German statutory law does not contain a general conflict of laws regulation of the status of the expropriation of shareholders' rights.

2. The practice of the Federal Supreme Court (Bundesgerichtshof) on the 'split-company theory' (Spaltungstheorie) does not furnish sufficient support for the assumption of the existence of a legal norm corresponding to this practice.

3. The Treaties for the Promotion and Protection of Investments concluded by Germany permit non-discriminatory expropriation of shareholders' rights to stock-companies on payment of compensation by the territorial State of the company's residence. Effects of an expropriation of shareholders' rights extend to the company's assets located in the territory of the respective contracting party.

II.

Indecisive Arguments

4. The proposition that no State can perform sovereign acts outside its own territory (principle of territoriality) has no effect upon consequences of foreign acts of expropriation in a domestic forum.

5. Foreign public law is not necessarily excluded from the operation in the domestic sphere.

6. There are no convincing reasons for the assumption that foreign public law 'hostile to property rights' or foreign 'statutes of a political or economico-political nature' are not to be applied in a domestic forum. Nor is it advisable to generally disregard foreign prescriptions whenever the domestic forum would otherwise not only 'apply' but also 'enforce' such prescriptions.

7. The 'location' of shareholders' rights as a category of property- or company-law does not predetermine questions relating to the international law of expropriation.

III.

The Treatment of Expropriation of Shareholders' Rights in the Conflict of Laws

8. Foreign expropriation law is neither already applicable according to an established rule of private international law nor a-priori inapplicable.

9. The application of foreign law with a claim to extraterritorial effect seems advisable, provided that there are no conflicting domestic norms, if the facts of the case are sufficiently closely connected to the enacting State. The closeness of these connections must be determined from case to case. Neither reciprocity nor fungibility in the sense of homogeneity with international norms should be regarded as absolute preconditions for the applicability of foreign law in a domestic forum. The rules relating to public order will afford an adequate second line of defence.

10. The expropriation of shareholders' rights in stock-companies should generally have to be seen as directed also at company assets located abroad.

11. Under the international law of expropriation a State clearly has a sufficiently close connexion to a stock-company, subject to its law, if the company performs substantial portions of its economic activity in that State.

12. Expropriations of shareholders' rights against adequate compensation should be made effective also extraterritorially provided there are no other bars to their application.

13. a) The legal consequences envisaged by the 'moderate' and the 'extreme' split-company theories (Spaltungstheorie) for the confiscation of parts of shareholders' rights to a stock-company without compensation are incompatible with the Federal Constitution (Grundgesetz).

b) In analogy to § 738 para. 1 of the German Civil Code (BGB), the shareholders affected by the confiscation should be granted a claim against the company equivalent to the material value of their shares before confiscation, subject to the condition that these claimants will not be put into a more favourable position than those shareholders who have not lost their rights.

14. Although arguments for the split-company theory (Spaltungstheorie) look more favourable where all, or practically all, shareholders' rights have been confiscated, the procedure for the settlement of obligations by way of § 738 German Civil Code (BGB) will be more suitable also in these cases.