

**MENDEL UNIVERSITY IN BRNO**  
**FACULTY OF BUSINESS AND ECONOMICS**

**To which extent are private pensions in life  
insurances protected in case of  
bankruptcy?**

THESIS OF DISSERTATION

Johannes Fiala

Supervisor: doc. JUDr. Ing. Radek Jurčák Ph.D.

BRNO 2014

## Statutory Declaration

Herewith I declare that I have written my final thesis: "To which extent are private pensions in life insurances protected in case of bankruptcy?" by myself and all sources and data used are quoted in the list of references. I agree that my work will be published in accordance with Section 47b of Act No. 111/1998 Sb. On Higher Education as amended thereafter and in accordance with the *Guidelines on the Publishing of University Student Theses*.

I am aware of the fact that my thesis is subject to Act. No. 121/2000 Sb., the Copyright Act and that the Mendel University in Brno is entitled to close a licence agreement and use the results of my thesis as the "School Work" under the terms of Section 60 para. 1 of the Copyright Act.

Before closing a licence agreement on the use of my thesis with another person (subject) I undertake to request for a written statement of the university that the licence agreement in question is not in conflict with the legitimate interests of the university, and undertake to pay any contribution, if eligible, to the costs associated with the creation of the thesis, up to their actual amount.

In Brno on:

.....

signature

## **Acknowledgements**

For the support and consultative advice during the conception and realisation of this thesis I would like to thank especially my tutor doc. JUDr. Ing. Radek Jurčík Ph.D. and his always helpful colleagues at Mendel University in Brno.

**Abstract:** The German State promotes the setting up of private pension insurance from a tax perspective, in particular via life insurance. This is done with the aim of citizens not being dependent on social benefits when they reach old age (principle of subsidization). This is contrasted with the interests of the creditors of the citizens whose monetary claims are protected by the protection of property requirement of the constitution. The building up of assets and asset protection among citizens therefore involves tension between the interests of creditors and realizing retirement pension assets.

Taking life insurance as an example, the investigation shows that protection of creditors in Germany is predominant. Protection of the life insurance asset dominates in Switzerland and even more so in Liechtenstein. From the point of view of welfare economics, Germany offers assets protected against enforcement, which only protects pension payments below the subsistence level. Life insurance in Switzerland and Liechtenstein offer "homo economicus" – above all the self-employed – additional asset protection for taking care of the family.

**Keywords:** asset protection, bankruptcy, creditor protection, homo economicus, life insurance, pension, welfare economy.

# CONTENTS

<b>1</b>	<b>INTRODUCTION .....</b>	<b>7</b>
<b>2</b>	<b>OBJECTIVES AND METHODOLOGY.....</b>	<b>11</b>
2.1	OBJECTIVES .....	11
2.2	METHODOLOGY .....	12
<b>3</b>	<b>SURVEY OF LITERATURE .....</b>	<b>14</b>
3.1	EXEMPTION FROM EXECUTION FOR PRIVATE LIFE INSURANCE AND STATUTORY PENSIONS.....	14
3.1.1	<i>Generally No Exemption from Execution for Pensions .....</i>	<i>15</i>
3.1.2	<i>As an Exception, Exemption from Execution in case of "Severity", Section 765a Code of Civil Procedure .....</i>	<i>16</i>
3.1.3	<i>Exemption from Execution for Small Capital for Small Pensions, Section 851c Code of Civil Procedure .....</i>	<i>17</i>
3.1.4	<i>Exemption from Execution of Minimal Additional Riester Pensions, Section 851d Code of Civil Procedure .....</i>	<i>20</i>
3.1.5	<i>Protection from Execution of Minimal Funeral Cost Insurance.....</i>	<i>25</i>
3.1.6	<i>No Exemption from Execution in Case of a Pension Rights Adjustment under the Law of Obligations.....</i>	<i>25</i>
3.1.7	<i>No Exemption from Execution for the Setting of a Retirement Pension .....</i>	<i>26</i>
3.1.8	<i>Assets Exempt from Execution from Statutory Pension Contributions .....</i>	<i>27</i>
3.1.9	<i>Exemption from Liability in Case of Occupational Pension Plans.....</i>	<i>28</i>
3.2	NO EXEMPTION FROM EXECUTION IN CASE OF A CLAIM TO CAPITAL BENEFITS .....	29
3.3	EXECUTION OF CLAIMS FROM AN OCCUPATIONAL RETIREMENT PENSION .....	30
3.4	EXECUTION BEFORE INSOLVENCY IS NOT RECTIFIED BY MEANS OF THE INSOLVENCY PROCEEDINGS.	34
3.5	PRIVATE RETIREMENT PENSION THROUGH LIFE INSURANCE FROM SWITZERLAND.....	35
3.6	PRIVATE RETIREMENT PENSION THROUGH LIFE INSURANCE FROM LIECHTENSTEIN.....	39
<b>4</b>	<b>RESULTS.....</b>	<b>45</b>
4.1	PRIVILEGED STATUTORY RETIREMENT PENSION IN THE DEPOSIT PHASE.....	46
4.2	DEPENDENCY ON RISKS RELATING TO POLITICS, AS WELL AS CAPITAL MARKETS.....	46
4.3	LIMITATION OF PRIVATE RETIREMENT PENSIONS THAT ARE EXEMPT FROM EXECUTION .....	48
4.4	LEGALLY LIMITED EXEMPTION FROM EXECUTION IN THE PAY-OUT PHASE.....	49
4.5	ASSET PROTECTION BY PROTECTING THE FAMILY HOME .....	49
4.5.1	<i>The Family Home as Part of the Retirement Pension.....</i>	<i>50</i>
4.5.2	<i>Timely Priority Notice Protects against Contestability .....</i>	<i>51</i>
4.5.3	<i>Transfer as an Allocation or Gift Resulting from Marriage.....</i>	<i>52</i>
4.5.4	<i>Transfer also for Asset Protection.....</i>	<i>54</i>
4.5.5	<i>Transfer Subject to Reclamation at any Time.....</i>	<i>55</i>
4.5.6	<i>Transfer subject to Repayment After Failure of Marriage .....</i>	<i>58</i>
4.5.7	<i>Transfer in Exchange for Settlement of the Previous Matrimonial Gain.....</i>	<i>64</i>
4.5.8	<i>Transfer in Exchange for a Rental or Lease Right .....</i>	<i>67</i>
4.5.9	<i>Transfer in Exchange for a Life-time Right of Abode.....</i>	<i>68</i>
4.6	TRANSFER OF ASSETS AS MAINTENANCE .....	72
4.6.1	<i>Asset Protection without Spouses or Third Parties.....</i>	<i>74</i>
4.6.2	<i>Asset Security of Family Pool, Family GmbH, Foundation or Trust.....</i>	<i>75</i>
4.6.3	<i>Recourse to Social Welfare Authorities .....</i>	<i>78</i>
<b>5</b>	<b>DISCUSSION.....</b>	<b>81</b>
5.1	WELFARE ECONOMICS.....	81
5.2	HOMO ECONOMICUS.....	82
5.2.1	<i>Security through Statutory Mandatory Contributions to Pension Funds or Schemes .....</i>	<i>82</i>

5.2.2	<i>Security through German Life Insurance</i> .....	83
5.2.3	<i>Security through Life Insurance Policies from Switzerland and Liechtenstein</i> .....	86
5.2.4	<i>Securing of the Family Home</i> .....	87
5.2.5	<i>Asset Protection through Internal Family Contracts and Companies</i> .....	88
5.2.6	<i>Security through Timely Private Insolvency</i> .....	89
<b>6</b>	<b>CONCLUSION</b> .....	<b>91</b>
6.1	HYPOTHESIS OF A SUBSISTENCE LEVEL PROTECTED AGAINST INSOLVENCY THROUGH LIFE INSURANCE.....	91
6.2	POLITICAL IMPLEMENTATION OF PAY-AS-YOU-GO PROCESS .....	91
6.3	EXEMPTION OF LIFE INSURANCE FROM EXECUTION –COMPARISON WITH SWITZERLAND AND LIECHTENSTEIN .....	92
6.4	PROTECTION AGAINST EXECUTION IN CASE OF STATUTORY MANDATORY INSURANCE .....	93
6.5	OPTIMIZATION DECISION OF HOMO ECONOMICUS.....	94
6.6	STRATEGIC CONDUCT OF HOMO ECONOMICUS IN THE EVENT OF AN IMPENDING EXECUTION.....	95
<b>7</b>	<b>REFERENCES</b> .....	<b>96</b>
<b>8</b>	<b>APPENDICES</b> .....	<b>100</b>

# 1 INTRODUCTION

*"All that's secure about the governmental pension plan are the gaps in coverage."*

*André Kostolany*

The reason for the investigation is the observation that the insolvency of the self-employed, i.e. freelancers and tradesmen, often leads to at least the partial loss of assets for retirement. The objective of a pension is to ensure maintenance of livelihood, primarily in old age, but also (often optionally) in case of disability and to secure the livelihood of survivors.

The background to the investigation is an obviously increasing risk of poverty in old age.

German legislators also resolved on an on-going reduction in the level of statutory pensions. The intention is for this to be offset increasingly by individuals' own savings in favour of a tax-sponsored funded pension.

The promotion of occupational retirement pensions, in particular the introduction of a claim to deferred compensation as of 2002, is to be considered in connection with the (purported<sup>1</sup>) demographic development of the population structure and the associated reduction in the level of payments from the statutory pension since 2001. The cause of increasing statutory pension insurance is, however, obviously the political decision on a long-term decoupling of wages

and salary of employees from participation in advances in productivity and therefore the distribution of social prosperity<sup>2</sup>. In order to bridge the resulting gaps in coverage, legislators want to promote the independent setup of a private and occupational pension covered by capital<sup>3</sup>, which they consider essential.<sup>4</sup> In order to offset a reduction in the pension level<sup>5</sup> of around 53% of the average gross income to 46% (2020) or 43% (from 2030) or with reference to the net income of 70% (in 2003) to 57% (in 2048)<sup>6</sup>, as well as, for example, the raising of the retirement age and the additional burden from taxes (German Retirement Income Act), in 2002, the tax Riester promotion in particular in the form of supplements for tiny private pensions was introduced<sup>7</sup>.

If one does not assume 45 years of contributions, which is only achieved by a minority of pensioners, but rather 40 years of insurance, gross pension revenue up to 2020 will decrease to 37.3%<sup>8</sup>.

---

<sup>1</sup> See Bosbach, Gerd, Die instrumentalisierte Zukunftsangst: Gesetzliche oder private Rentenversicherung, wer hat den Nutzen?, in: [http://www.teleakademie.de/begleit/video\\_ta120401.php](http://www.teleakademie.de/begleit/video_ta120401.php)

<sup>2</sup> Bosbach, Gerd, *Demographische Entwicklung – kein Anlass zur Dramatik*, [http://www.nachdenkenseiten.de/upload/pdf/gbosbach\\_demogr.pdf](http://www.nachdenkenseiten.de/upload/pdf/gbosbach_demogr.pdf)

<sup>3</sup> "Pay-as-you-go financing builds mainly on the productivity of future generations. Capital coverage, on the other hand, is based on the productivity of companies or on government. Government debt will never be paid back, especially not from taxes. The repayment in the generation of pensioners is financed by the savings of the next generation of active employees. For this reason, the capital coverage is referred to as a "contract between the generations". You could also call it a snowball system. It is nevertheless guaranteed that it will continue to function because the government can also force such capital-covered pension insurance.", Schramm, Peter, [www.pkv-gutachter.de](http://www.pkv-gutachter.de)

<sup>4</sup> See Bundestag Printed Matter 14/4595, p. 1.

<sup>5</sup> In contrast, a pension level of 60% of the former gross income should be achieved in Switzerland (statutory "retirement and surviving dependents pension" as a first pillar without any contribution ceiling, as well as an obligatory "occupational pension" as a second pillar), cf. Ruch, Sabine, *Sozialversicherungssysteme im Vergleich*, in: <http://www.sassonia.de/ifkvpdf/sozialsysteme.pdf>, p.10.

<sup>6</sup> *Deutsches Institut für Altersvorsorge*, Die Reformen seit 2001 senken das Rentenniveau, in: <http://www.dia-vorsorge.de/downloads/df050319.pdf>

<sup>7</sup> Oehler, Andreas, Altersvorsorge in Deutschland: Mängel mit System?, in: [http://www.uni-bamberg.de/fileadmin/uni/fakultaeten/sowi\\_lehrstuehle/finanzwirtschaft/Transfer/Altersvorsorge\\_Maengel\\_im\\_System.pdf](http://www.uni-bamberg.de/fileadmin/uni/fakultaeten/sowi_lehrstuehle/finanzwirtschaft/Transfer/Altersvorsorge_Maengel_im_System.pdf)

<sup>8</sup> Hanesch, Walter, *Die Entwicklung der Grundsicherung im Alter im Zeitraum 2008-2020*, in: <http://vdk.de/cms/mime/2917D1314171814.pdf>



Albrecht Müller<sup>9</sup> already determined in 2004 that the switch to a capital-covered retirement pension in Chile<sup>10</sup> led to major old-age poverty. This "pseudo-individualization through pension reform" does not resolve the task of distributing real income between generations<sup>11 12</sup>. In addition, there are difficulties resulting from the (re-)distribution of assets and income within society<sup>13 14</sup>.

In general, it can be noted that the switch of the largest economies, including China, from the generation model to a capital-covered model fails already because (globally) there are not even sufficient investment opportunities<sup>15</sup> in the real economy for pension schemes of this kind.

Even today, 25% of the population are no longer able to build up any savings. The German Federal Office of Statistics placed the risk of insolvency, for example, among the self-employed at around 1% p.a.

Even the wealthy can suddenly lose their pensions. In economic terms, the matter concerns "welfare economics" and the "homo economicus".

The paper concentrates on the financial product of life insurance because in Germany everyone has an average of one or more contracts for private retirement insurance. This interests above all the self-employed because most of

---

<sup>9</sup> Müller, Albrecht, *Die Reformlüge*, Munich 2004; [www.nachdenkseiten.de](http://www.nachdenkseiten.de).

<sup>10</sup> Chile thus served as a model for many other States in Latin America.

<sup>11</sup> Ganßmann, Heiner, *Der Großvater, sein Enkel und die Rentenreform*, in: <http://userpage.fu-berlin.de/~ganssman/texte/Der%20Gro%DFvater.pdf>

<sup>12</sup> Feld, Lars, *Verschuldung in Deutschland und der EU als Problem der Generationengerechtigkeit*, in: [http://www.tele-akademie.de/begleit/video\\_ta120415.php](http://www.tele-akademie.de/begleit/video_ta120415.php)

<sup>13</sup> Kreiß, Christian, *Studium Generale über die aktuelle Wirtschaftskrise und Eurokrise*, in: <http://www.youtube.com/watch?v=7CPW7zzpsfg>

<sup>14</sup> Bach, Stefan, *Vermögensabgaben – ein Beitrag zur Sanierung der Staatsfinanzen in Europa*, in: DIW Wochenbericht No. 28/2012 of 11 July 2012, p. 3 et seqq.

them do not pay into the statutory pension system. The working hypothesis is that the risk of insolvency is only minimal if only the subsistence level for the person's own maintenance is involved.

---

<sup>15</sup> Not addressed thereby are "financial innovations, financial bubbles" or national debt.

## **2 OBJECTIVES AND METHODOLOGY**

### **2.1 Objectives**

To which extent are private pensions in life insurances protected in case of bankruptcy? The objective is an identification of legal gaps with regard to bankruptcy risks. Conversely, there is the question of scope and contents of statutory asset protection in private pension schemes. On this basis, the limits of private independent contractual regulations are to be illustrated.

There is a question of protection and gaps in protection in retirement pensions in case of insolvency. What protection is provided by law? Where do additional contractual regulations meet the limits of legal options? As a comparison, what is the situation in the neighbouring countries of Switzerland and Liechtenstein? An example of one of the reasons behind this work is the observation that insurers in Germany and abroad claim in their marketing material that life insurance is protected against insolvency, but there has not yet been a comparative scientific study of the dealings and the framework conditions.

From the view of welfare economy, the issue is the welfare increase, in society as a whole, with the normative valuation of redistribution effects between the State, companies (including creditors and debtors), as well as private households being affected.

The "homo economicus" behaviour model results in the individual benefit (self interest theory) and aiming for the highest level of benefit (rationality theory) in selecting between various different options for arrangements or actions. The question of the ability to make choices and of alternatives relates both to statutory pension provision in a pay-as-you-go system and to capital-covered insurance.

The basis for the scientific goal of the dissertation is a system of existing (statutory) regulations, as well as case law, to find out if there are any gaps in coverage. Subsequently, solution options to a (privately autonomous) set of statutory provisions can be developed, such as the election of foreign law.

## **2.2 Methodology**

German and foreign laws, national and international court decisions, and specialized papers are to be evaluated.

In an initial step, the protection of pensions against seizure from private, statutory, and occupational retirement pensions will be examined. A comparison will be made between the provisions of private life insurance policies from a selection of other countries.

In a second step, the limitation of asset protection will be discussed. Commonly proposed solutions from practice will be examined on the basis of case law to see what their capacity would be. This will also include an investigation into which other options may be available as an alternative for the protection of real estate as family home.

## **3 SURVEY OF LITERATURE**

### **3.1 Exemption from Execution for Private Life Insurance and Statutory Pensions**

With regard to life insurance, a differentiation is made between the traditional version, where assets are primarily invested by the insurer in financial securities (bonds). In addition, there is the life insurance cover or unit-linked life insurance, in which an investment can also be made in material assets (equities, occasionally precious metals and real estate).

In principle, in accordance with Section 850c German Code of Civil Procedure, the income of a single person is exempt from execution up to EUR 1,049.99. For married persons, if maintenance is due to the spouse, this amount is EUR 1,439.99. All income sources are to be summarized for this purpose. This income, for example, includes private pensions from life insurance policies, occupational retirement pension payments, as well as payments from pension schemes and statutory pension insurance.

Since 31 March 2007, staggered based on age, it has been possible in accordance with Section 851c Code of Civil Procedure to keep up to EUR 256,000 of assets in a life insurance policy exempt from execution. In accordance with Section 851c Code of Civil Procedure, initially a further 30% of the policy reserve would be protected from execution by the creditor during the savings phase. Another requirement is that only a pension pay-out is provided for contractually.

Creditors and insolvency administrators can utilize non-protected assets for retirement pensions.

### 3.1.1 Generally No Exemption from Execution for Pensions

Brunswick Regional Court<sup>16</sup> has already resolved by means of a decision dated 08 October 1997 that "freelancers, non-employed persons and tradespeople" do not enjoy any legal exemption from execution for "insurance pensions for maintenance in old age" (at that time there was not yet any Section 851c Code of Civil Procedure). This is only legally prescribed for employees and officials.

The German Federal Court of Justice confirmed in decisions dated 15 November 2007<sup>17</sup> that private pension insurance pensions (e.g., annuity, accident, and disability pensions) of freelancers, tradespersons, and the self-employed do not have any exemption from execution because this is not earned income as defined in the regulation on the exemption from execution (Sections 850 et seqq. Code of Civil Procedure). This also relates to "exempt life insurance", which was sometimes used as an alternative to statutory mandatory insurance in German pension insurance (DRV). If, therefore, neither Section 850b I Code of Civil Procedure nor Section 850b III Code of Civil Procedure are applicable, then the only remaining option for those affected before insolvency is Section

---

<sup>16</sup> Brunswick Regional Court, judgment of 08 October 1997, Case 8 T 566/07 = NJW-RR 1998, 1690 et seqq.

<sup>17</sup> Federal Court of Justice, decisions of 15 November 2007, Case IX ZB 99/05 = NZI 2008, 95; Case IX ZB 34/06.

765a Code of Civil Procedure<sup>18</sup> ("only upon application!") – and recently, if applicable, Section 851c Code of Civil Procedure.

Contrary to the earlier opinions<sup>19</sup>, pensions resulting from occupational disability are attachable.

### 3.1.2 As an Exception, Exemption from Execution in case of "Severity", Section 765a Code of Civil Procedure

In such cases, as an exception, only a portion is exempt from execution, only up to the welfare rate, Section 765a Code of Civil Procedure. In this case, however, (virtually) the State is only relieved because no debt settlement takes place at the cost of the State<sup>20</sup>. This also affects cases where the pay-out of a higher base pension is seized without withholding of tax at source and the "pay-out" then results in new tax liabilities. The Federal Court of Justice limited applicability to cases where execution is morally intolerable, so that relief at the expense of the State as a result of need that is then incurred (or is incurred in the future) or as a result of increased need (social benefits) is taken into account<sup>21</sup>. The outcome of proceedings after an application in accordance with Section 765a Code of Civil Procedure is uncertain in practice.

---

<sup>18</sup> In practice, tenants with evictions threaten suicide in order to bring to bear Section 765a Code of Civil Procedure. The opponent will then make the "appropriate" application to the guardianship court, for example for enclosed accommodation as a result of self-endangerment.

<sup>19</sup> Higher Regional Court Oldenburg, judgment of 23 June 1993, Case 2 U 84/93.

<sup>20</sup> Brunswick Regional Court, judgment of 08 October 1997, Case 8 T 566/97.

<sup>21</sup> Federal Court of Justice, judgment of 21 December 2004, Case Ixa ZB 228/03; dissenting Lemgo Local Court, decision of 17 January 2007, Case 14 M 916/06.



### 3.1.3 Exemption from Execution for Small Capital for Small Pensions, Section 851c Code of Civil Procedure

In 2007, the legislators introduced a small pension that is exempt from execution based on Section 851c Code of Civil Procedure if purely pension insurance without a lump sum option is involved. The capital that is exempt from execution formed with the life insurer by means of premium payments totals, for example, EUR 4,500.00 annually from the 40<sup>th</sup> to 47<sup>th</sup> year of life.

Age	Annual amount exempt from execution
18–29 years	EUR 2,000
30–39 years	EUR 4,000
40–47 years	EUR 4,500
48–53 years	EUR 6,000
54–59 years	EUR 8,000
60–67 years	EUR 9,000

Table 1: Table for Section 851 c Code of Civil Procedure:

It is possible to pay in for previous years at any time with an exemption from execution, i.e. at an age of 67, the complete amount of EUR 256,000.

Therefore, if necessary, in practice a simple subsistence level can be saved. The resulting pension can also be seized, but only as (if applicable also other) employment income (Section 851c(1) Code of Civil Procedure): originally, this pension should correspond to a monthly payment of EUR 990 after age 65<sup>22</sup>. As a result of the on-going low interest rate on most capital markets, more than half of the monthly rent should have become reasonable.

Only in association with Section 851c Code of Civil Procedure can the capital and the pension paid out be exempt from execution to a limited extent. Despite the contractual non-transferability always argued by insurers, any further exemption from execution is contrary to the fact that the exemption from execution is inconsistent with the settlement rights of creditors protected by contractual law. A simple contractual exclusion from withdrawal by the policyholder does not prevent execution, Section 165 Insurance Contracts Act old version<sup>23</sup><sup>24</sup>. In precisely this area, legislators did not exclude the possibility of extraordinary termination, Section 314 German Civil Code. Therefore, a prohibition of assignment and exclusion from withdrawal does not prevent sovereign execution in enforcement and subsequent contractual termination by the creditor.

---

<sup>22</sup> Hellwich, Günther, Pfändungsschutz zur Alterssicherung Selbständiger, in: JurBüro, Volume 6/2007, p. 295 et seqq., 289

<sup>23</sup> Federal Court of Justice, judgment of 01 December 2011, Case IX ZR 79/11.

Accordingly, claims can be executed to the limits of the surrender value exceeding the limits of Section 851c Code of Civil Procedure at the level of the policy reserve of the Rürup pension insurance despite the fact that they cannot be contractually assigned<sup>25</sup>. In accordance with Section 851(1) Code of Civil Procedure, non-transferrable receivables are subject to execution insofar as there are special provisions in this regard, as shown in the rules on execution in accordance with Section 851c Code of Civil Procedure ("if the surrender of the retirement pension exceeds the amount exempt from execution, three tenths of the excess amount are exempt from execution").

The conversion of a "normal" private insurance policy in accordance with Section 167 Insurance Contracts Act (including with a waiving of disposal in accordance with Section 168 III Insurance Contracts Act) into one in accordance with Section 851c Code of Civil Procedure removes the surrender value of the debtor's assets, so that Section 132 Insolvency Code is unaffected. Nevertheless, the conversion in accordance with Section 167 Insurance Contracts Act is not contestable<sup>26</sup> because the (future) insolvency debtor cannot make payments to itself free of charge (Section 134 I Insolvency Code). In addition, by doing so, none of the debtor's assets are "sold, given away, or surrendered". The insolvency debtor itself is not a suitable opponent to a contest, Section 143

---

<sup>24</sup> Fiala, Johannes / Schramm, Peter, BGH-Urteil stellt Insolvenzsicherheit der Zusatzversorgung infrage, in: V&S 07/2012, p. 34 et seq.

<sup>25</sup> Federal Court of Justice, judgment of 01 December 2011, Case IX ZR 79/11.

<sup>26</sup> Higher Regional Court Stuttgart, judgment of 15 December 2011, Case 7 U 184/11.

I Insolvency Code<sup>27</sup>. The right to conversion at any time materializes (only) as of the deadline for the next premium payment due, Section 12 Insurance Contracts Act<sup>28</sup>.

This conversion excludes private life insurance in accordance with Section 167 German Federal Civil Service Act if the insurance contract is assigned to third parties or "the right of disposal was forfeited by means of execution"<sup>29</sup>, or this contract already is considered part of the assets as a result of the initiation of insolvency proceedings ("attachment by means of insolvency")<sup>30</sup>.

#### 3.1.4 Exemption from Execution of Minimal Additional Riester Pensions, Section 851d Code of Civil Procedure

The new Section 851d Code of Civil Procedure protects only on-going payments from "Riester" pensions and that only within the usual amounts that are exempt from execution for employment income (for single people EUR 1,049.99 per month – for married people EUR 1,439.99), not, however, one-time capital pay-outs or the settlement of small pensions. Deposits are also protected, but only those that have already been supported through tax deduc-

---

<sup>27</sup> Federal Court of Justice, decision of 13 October 2011, Case IX ZR 80/11; Stuttgart Higher Regional Court, judgment of 15 December 2011, Case 7 U 184/11; dissenting Naumburg Higher Regional Court, judgment of 08 December 2010, Case 5 U 96/10.

<sup>28</sup> Zimmermann, Dieter, *Der neue Pfändungsschutz bei der Altersvorsorge*, Darmstadt 2008.

<sup>29</sup> BMWI, *Pfändungsschutz! – Sicherheit für die Altersvorsorge von Selbstständigen, Unternehmerinnen und Unternehmern*, 2008, p. 2.

<sup>30</sup> Federal Court of Justice, decision of 25 November 2010, Case VII ZB 5/08.

tions. If no support through tax deductions has been provided (yet), execution is possible<sup>31</sup>.

If during the pay-out phase there is still no other employment income (e.g., from statutory pension insurance or occupational pension scheme), Rürup and Riester pensions can also be fully executed because all employment income can be summarized. Income other than employment income can in any case generally be fully executed.

In its legal justification of Section 851c Code of Civil Procedure, legislators determined, "the retirement assets supported in accordance with Section 10a Income Tax Act and Section XI Income Tax Act [Riester] including its earnings, the on-going retirement pension contributions that are "supported" [only through allowances], and the claim to the allowance in accordance with Sections 82, 97 Income Tax Act are non-transferrable and are therefore also exempt from execution. A corresponding exemption from execution is not provided for the retirement pension assets promoted by tax benefits in accordance with Section 10(1) (2) b Income Tax Act (Rürup pension) itself...".

In its letter dated 31 March 2010,<sup>32</sup> the Federal Ministry of Finance clarified: "The execution of the retirement pension assets not promoted by tax benefits<sup>33</sup> is not contrary to a contractual prohibition on assignment and transfer." The Federal Court of Justice issued a corresponding decision on 25 August 2004<sup>34</sup>

---

<sup>31</sup> Mainz State Social Court, judgment of 03 November 2006, Case 3 Sa 414/06.

<sup>32</sup> Federal Ministry of Finance letter of 31 March 2010, ref. IV C 3 - S 2222/09/10041 and IV C 5 - S 2333/07/0003.

<sup>33</sup> Only the Riester pension is considered to be supported by tax benefits, but not the Rürup pension (base pension).

<sup>34</sup> Federal Court of Justice, decision of 25 August 2004, Case IX a ZB 271/03 = WM 2004, 2316.

that even a regulation on non-transferability in the articles of association of a pension fund is not opposed to being subject to execution.

This means that pension insurance not supported by tax allowances (base pensions, Rürup pensions) is subject to execution, if the further prerequisites of Section 851c Code of Civil Procedure are not present.

Recently anyway, the following applies: Even a disability pension in accordance with Section 850b German Code of Civil Procedure that is partially subject to execution is included in the insolvency assets, when it was declared to be subject to execution within an equity test<sup>35</sup>.

According to the prevailing opinion, only claims subject to conditional execution – such as those from a private disability pension (Section 850b(1)(1), (2) Code of Civil Procedure) – are in principle not included in the insolvency assets. The sense and purpose of Section 850b Code of Civil Procedure demand the application of the regulation overall in the insolvency proceedings accordingly. The basic exemption from execution that can be cancelled in full or in part only in individual cases and under certain conditions in accordance with Section 850b(2) Code of Civil Procedure should ensure that the debtor is left at least as much as is required to secure a subsistence minimum. Another purpose is an appropriate settlement of interest between debtor and creditor. Sums subject to execution should be subject to execution like employment income if execution with regard to the other movable assets of the debtor has not led to a settlement and the execution is fair. This also applies in the insolvency proceedings. Otherwise, the insolvency proceedings would be more favourable for the debt-

ors than individual execution proceedings. Even if the type of claim to be pursued does not have any significance here because it involves insolvency proceedings, equity decisions are possible. So, for example, in the determination of the amount subject to execution, the reason for and type of payment that the debtor receives, its level, as well as the remaining amounts are taken into account in case of execution. If, for example, the debtor is receiving a pension as a result of physical injury to body or health, the increased needs demonstrated by the debtor can be taken into account. A comprehensive and comprehensible overall assessment in which all circumstances of the individual case are taken into account is here required as well<sup>36</sup>.

The limited exemption from execution for a retirement pension for the self-employed in accordance with Section 851c Code of Civil Procedure requires that it is a "life-long payment made at regular intervals...which have primarily remained the same"<sup>37 38</sup>.

---

<sup>35</sup> Federal Court of Justice, judgment of 15 July 2010, Case IX ZR 132/09 = WM 2010, 1.

<sup>36</sup> Federal Court of Justice, Judgment of 24 September 2009, Case IX ZR 189/08 – announced on 03 December 2009 = NJW-RR 2010, 474.

<sup>37</sup> cf.:

Federal Court of Justice, judgment of 15 July 2010, Case IX ZR 132/09 = WM 2010, 1:  
"It must consist of life-long payments resulting from a retirement or (prior) health-related withdrawal from professional life ... in this situation, the purpose of the legislation is fulfilled because the purpose is to ensure that the pension capital is not used for purposes other than retirement provision and is only protected to an extent that is necessary to secure the needs of the insured party for livelihood security during retirement. The pension capital protected in this way then can also not be allocated improperly if it is guaranteed that the services are only performed at the beginning of the retirement pension, i.e. not before reaching the age of 60, or when disability occurs, and exclusively as a life-long payment...will be paid on the basis of a contract on a life-long basis and that remains mainly the same (with regard to the level) even if it is initially a disability pension, there are no concerns about recording the payments overall with Section 851c(1)(1) Code of Civil Procedure, also with regard to disability payments."

<sup>38</sup> Configuration option: in accordance with the new Insurance Contracts Act (2008) there is an option by means of Section 173 Insurance Contracts Act for private life insurance as such in accordance with Section 851c Code of Civil Procedure. This is possible at the end of the current insurance period – in an insolvency-proof manner (Wimmer, Klaus, Das Gesetz zum Pfändungsschutz der Altersvorsorge unter besonderer Berücksichtigung der Hinterbliebenen-

An isolated disability insurance (cf. occupational disability supplementary insurance at occupational pension schemes or, for example, base pension) with a typically agreed age at expiry of the payments, without a retirement pension of approximately the same level, is therefore not protected through Section 851c Code of Civil Procedure. Rürup pensions, however, where the payments do not mainly stay the same are not protected from execution by Section 851c Code of Civil Procedure, e.g., because there is a disability pension that is higher than the retirement pension (in the case decided by the Federal Court of Justice, the latter totalled only around a tenth<sup>39</sup>). There is also no protection for cases in which the disability pension ends and the retirement pension only follows months or years later. Then there is "no uniform retirement pension preferred only for health reasons". A lump-sum option with regard to the retirement pension will however result in protection from execution under Section 851c Code of Civil Procedure being cancelled, also with regard to disability pension (occupational disability supplementary insurance).<sup>40</sup> It is decisive that a disability pension for the self-employed is innately not subject to the protection of Section 850 III b Code of Civil Procedure and the protection from execution under Section 850 c Code of Civil Procedure does not apply if it is not paid on a life-long basis<sup>41</sup>. It makes no difference if a disability pension follows a retirement pension directly and at approximately the same level<sup>42</sup>.

---

versorgung, in: ZinsO, Volume 6/2007, p. 281 et seqq.). Therefore, these assets no longer form part of the insolvency assets (Stuttgart Higher Regional Court, Judgment of 15 December 2011, Case 7 U 184/11).

<sup>39</sup> In case of Rürup pensions, the premium portion for disability pension totals up to 50% of the total premium. This was sold in this way – but means that no retirement pension that is exempt from execution is in place in accordance with Section 851c Code of Civil Procedure.

<sup>40</sup> Dortmund Regional Court, judgment of 22 July 2008, Case 23 O 259/07.

<sup>41</sup> Hamm Higher Regional Court, judgment of 20 May 2009, Case 20 U 135/08.

<sup>42</sup> Federal Court of Justice, judgment of 15 July 2010, Case IX ZR 132/09.



### 3.1.5 Protection from Execution of Minimal Funeral Cost Insurance

Funeral cost insurance is protected up to the level of an originally agreed insurance amount of EUR 3,579, Section 850 b I (4), II Code of Civil Procedure.<sup>43</sup> A burial provision contract with a fiduciary advance payment, on the other hand, would be subject to notice, so that the right to restitution would be subject to execution and utilizable assets as defined under Section 90 I German Social Code XII<sup>44</sup>. A grave maintenance for the period after the death of the trustee would be subject to termination at any time during life<sup>45</sup>. As is the case in accordance with Section 850 a Code of Civil Procedure vacation allowance that is exempt from execution<sup>46</sup> and for overdrafts that are exempt from execution<sup>47</sup>, items and receivables that are exempt from execution are not included in the insolvency assets, Section 36 I German Insolvency Code.

### 3.1.6 No Exemption from Execution in Case of a Pension Rights Adjustment under the Law of Obligations

The claim (by the insolvency debtor) to a pension rights adjustment under the law of obligations also falls under the insolvency assets<sup>48</sup>. After the initiation of the insolvency proceedings, the holder of the retirement pension will stop pay-

---

<sup>43</sup> Federal Court of Justice, decision of 12 December 2007, Case VII ZB 47/07

<sup>44</sup> Detmold Social Court, judgment of 30 July 2010, Case L 9 SO 518/10.

<sup>45</sup> Federal Court of Justice, judgment of 12 March 2009, Case III ZR 142/08.

<sup>46</sup> Federal Court of Justice, decision of 26 April 2012, Case IX ZB 239/10.

ment to the spouse benefitting as a result of a pension rights adjustment under the law of obligations by means of an assignment of occupational pension rights (i.e. this insolvency creditor) and only begin making payments again after release of the encumbered spouse from the legal debt. These claims are also subject to execution. An increase in the amount that is exempt from exemption with regard to the encumbered insolvent spouse will not be considered, meaning that internal claims against the holder of the pension are more advantageous.<sup>49</sup>

### 3.1.7 No Exemption from Execution for the Setting of a Retirement Pension

Legislators did not provide for an additional amount that is exempt from execution for the setting up of a retirement pension in case of insolvency: "The protection for certain private insurance intended for retirement pensions introduced by the act on exemption from execution for private retirement pensions covers only the policy reserve built up by the insured party and the payments to be made after the occurrence of the insured event, not, however, to the debtor's resources that are necessary for the deposits."

"Section 851c(2) Code of Civil Procedure provides exemption from execution with regard to the extent stated there only for the policy reserve saved for private pension insurance as defined under Section 851c(1) Code of Civil Procedure and the pension sums to be paid out upon occurrence of the insured

---

<sup>47</sup> BGHZ 93, 315; in contrast, the overdraft is subject to execution, BGHZ 147, 193.

<sup>48</sup> Federal Court of Justice, decision of 15 November 2011, Case IX ZB 80/10.

<sup>49</sup> Federal Court of Justice, loc.cit.

event. Exemption from execution with regard to the amounts necessary to set up the policy reserve is not associated with the regulation. No such exemption arises from Section 850f(1)(b) Code of Civil Procedure."<sup>50</sup>

### 3.1.8 Assets Exempt from Execution from Statutory Pension Contributions

The self-employed (freelancers and businesspeople) can pay in to a statutory pension scheme (German Pension Insurance) or a suitable pension fund in order to build up vested pension rights during the savings phase, Sections 7 Social Code VI, 54 IV Social Code I<sup>51</sup>. The rationale behind this was intended to be the refinancing of government debt but also the view that the self-employed have the opportunity to earn more and are therefore less in need of protection<sup>52</sup>. In any case, future claims to pay-outs of a pension for a reduction in earning capacity or a retirement pension against the holder of the statutory pension (German Pension Insurance) are subject to execution in accordance with Section 54 IV Social Code I<sup>53</sup>. While in case of the garnishment of earnings, the claim to payroll in Sections 412, 401 Civil Code is also transferred to the pledgee as a subsidiary right, this is not the case with regard to pension

---

<sup>50</sup> Federal Court of Justice, decision of 12 May 2011, Case IX ZB 181/10.

<sup>51</sup> Federal Court of Justice, judgment of 15 July 2010, Case ZR 132/09, with additional references

<sup>52</sup> Federal Court of Justice, decision of 15 November 2007, Case ZB 99/05.

<sup>53</sup> Federal Court of Justice decision of 21 November 2002, Case ZB 85/02; Federal Court of Justice decision of 10 October 2003, Case IXa ZB 180/03.

information and pension data because then these are only non-binding forecasts<sup>54</sup>.

### 3.1.9 Exemption from Liability in Case of Occupational Pension Plans

Various occupational groups (e.g., doctors, notaries, architects, tax consultants) are obligated to pay in to one of around 90 pension plans or pension associations. Unlike German Pension Insurance (pay-as-you-go system, generation model), this is capital-covered retirement pension insurance through these public law bodies. The contributors are mainly those for whom membership is compulsory.

The exemption from execution of claims on the basis of state law arises from the fact that they cannot be assigned only if the exemption from execution is consistent with the constitutionally protected settlement rights of the creditor. According to this, claims against the pension scheme for lawyers, for example, are subject to execution in Baden-Württemberg despite the fact that they cannot in principle be assigned within the limits of Section 850c Code of Civil Procedure (in the payment phase, as well as future claims)<sup>55</sup>. This also applies to other pension associations/pension schemes, for example, pharmacists, dentists, accountants, and veterinarians. A provision in the articles of association –

---

<sup>54</sup> Federal Court of Justice, decision of 09 February 2012, Case VII ZB 117/09.

<sup>55</sup> Federal Court of Justice, judgment of 28 October 2004, Case IXa ZB 271/03 = WM 2004, 2316.

on non-transferability – is not opposed to being subject to execution<sup>56</sup>. In any case, the execution (if applicable on future payments) only comes into effect after the payment phase.

### ***3.2 No Exemption from Execution in Case of a Claim to Capital Benefits***

Only in case of a pro-rated solution with reference to the benefits during the pay-out phase, i.e. only in case of a pension claim without a lump-sum option is the monthly exempt amount<sup>57</sup> from the private pension even available in case of a private or occupational retirement pension. Because the simple existence of a lump-sum option (without it being exercised) does not result in an exemption from execution.

Endowment life insurance policies are not exempt from execution because the insured party can (still) choose a pension instead of a capital benefit that is due. According to the Federal Finance Court, however, this applies as long as this option right has not yet been exercised. If it wishes to bring about an exemption from execution, it must decide on the pension before the execution of the life insurance because it loses its option with the execution<sup>58</sup>.

The opposite case is disputed, i.e. whether the lump-sum option is subject to execution. According to Stöber (Act on Forced Sale and Sequestration), this right is exempt from execution because it is personal. The waiving of the lump-sum option (except in case of death and/or protection for surviving dependents)

---

<sup>56</sup> Federal Court of Justice decision of 25 August 2004, Case IXa ZB 271/03.

<sup>57</sup> cf. Sections 850 et seqq. Code of Civil Procedure

with a conversion in accordance with Section 173 Insurance Contracts Act can (if applicably, partially, at the level, for example, of Hartz-IV) lead to exemption from execution in accordance with Section 851c Code of Civil Procedure<sup>59</sup>. In any case, a problem is whether an occupational disability insurance can be viewed as life insurance as defined under Section 851c Code of Civil Procedure, particularly since probably a handful of suppliers offer this as a "life-time occupational disability insurance". In case of a non-life-time occupational disability insurance/occupational disability supplementary insurance, the retirement pension must follow without any time gap and at approximately the same level, for Section 851 c Code of Civil Procedure to take effect<sup>60</sup>.

### ***3.3 Execution of Claims from an Occupational Retirement Pension***

In case of normal employees, these claims to occupational pensions can be executed with the carrier (employer, life insurance company, pension fund, provident fund, pension fund) even if they are only paid out later.

There can be a duty of care and consideration on the part of the employer (Section 241 Civil Code), to approve an occupational pension scheme rescission – in case of an emergency on the part of the employee – by means of termination as an insured party/employer<sup>61 62</sup>. It is therefore up to the creditor and

---

<sup>58</sup> Federal Finance Court, Judgment of 31 July 2007, Case R 60/06 = DStR 2007, p. 1817.

<sup>59</sup> Federal Court of Justice, judgment of 15 July 2010, Case IX ZR 132/09 = WM 2010, 1.

<sup>60</sup> Federal Court of Justice, judgment of 15 July 2010, Case IX ZR 132/09.

<sup>61</sup> Bremen State Labour Court, Judgment of 22 June 2011, 2 Sa 76/10.

the insolvency administrator to convert the (if applicable, future) proportional right to pay-out into immediately utilizable capital.

In case of self-employed people who are employed as managing shareholders, there is frequently a claim to an occupational pension. Often the case is a pension right with pledging of the reinsurance. This legal lien can be executed from a sovereign perspective. The "readiness to be pledged" therefore comes into effect with regard to the pension claims of the person entitled to benefits in accordance with the case law of the higher courts in principle not (only) on a pro-rated basis. This means that a creditor or insolvency administrator regularly has available the entire reinsurance assets when the pension starts. This affects mainly cases where initially the limited liability company (GmbH) of the managing shareholder becomes insolvent and then also the managing shareholder personally.

Because according to Sections 1228(2), 1273(2) (1) Civil Code, the pledgee<sup>63</sup> (managing shareholder) is entitled to realization or collection (Section 1282 I Civil Code), as soon as its receivable (from the pledged pension) is due in full or in part. Frequently, the GmbH of the managing shareholder becomes insolvent first. Then, in accordance with Section 41(1) Insolvency Code in future, only receivables that become due against the insolvency debtor (GmbH) as a

---

<sup>62</sup> Configuration option: in any case, the termination (or employer approval) with complete pay-out of the redemption value – instead of a simple release from contributions – is contrary to the articles of association, the benefit plan, or the contractual terms and conditions of the carrier of the occupational pension scheme, e.g., in case of a pension fund.

<sup>63</sup> It is frequently overlooked that reinsurance cover due in case of pay-out to a GmbH does not lead to a "replacement pledge" but rather the credit institution will acquire a trusting primary General Terms and Conditions lien.

result of a fiction of law will be declared due. This also applies to receivables that are secured through a pledge entitling them to separation<sup>64</sup>. That means – in any case in case of the insured event occurring – that the receivables from a pension pledge become due overall, although their value in accordance with Section 45 Insolvency Code is to be estimated based on the application of the recognized rules of actuarial theory<sup>65</sup>. In case of insurance claims, capitalization must be performed.<sup>66</sup> Brandenburg Higher Regional Court<sup>67</sup> considers even from partial readiness to pledge as a result of pension claims due monthly that only the pledgee is authorized to collect<sup>68</sup>, Sections 1282 I 1 in connection with 1228 II 1 Civil Code.

An insurer will (initially) have to pay double if it has already paid out the reinsurance to the GmbH Insolvency Code administrator in error<sup>69</sup>. According to the Federal Court of Justice<sup>70</sup>, readiness for execution requires only partial maturity, Section 1282 II Civil Code. The right to collect in accordance with Section 1292 I Civil Code occurs in case of pension payments "again on a monthly ba-

---

<sup>64</sup> BGHZ 31, 337, 340 et seq.; Higher Regional Court Hamm, WM 1996, 1938.

<sup>65</sup> The estimate requires, if applicable, for inspection, an expert, e.g., [www.pkv-gutachter.de](http://www.pkv-gutachter.de), cf. Braun/Bäuerle, Insolvency Code, Section 45, margin note 7, see also MünchKomm-InsO/Lwowoski-Bitter, Section 45, margin note 5

<sup>66</sup> Cologne Higher Regional Court, judgment of 26 November 2003, Case 5 U 72/03 = Higher Regional Court report Cologne 2004.

A judgment by the Higher Regional Court Hamm of 12 May 1995 (Case 20 U 37/95 = NJW-RR 1996, 1312) states in this respect:

"The [retirement pension] receivable of the couple E was not initially due, just old. When the insolvency proceedings were initiated, however, it became due in accordance with Section 65 I Bankruptcy Code [now: Section 41 Insolvency Code]. This regulation, through which a settlement of debts because of insolvency is to be supported by means of the inclusion of the old receivables, also applies to the creditors entitled to separation (cf. BGHZ 31, 337 = NJW 1960, 675 = LM Section 65 KO No. 1)."

<sup>67</sup> Brandenburg Higher Regional Court, judgment of 12 October 2011, Case 7 U 41/10.

<sup>68</sup> Note: The (ex)-managing director in question had (moreover) failed to report what remained of his monthly pension in the insolvency schedule.

<sup>69</sup> Design option: even if the extent of pledged reinsurance assets is lower than or could be lower than the expected pension claims before or after readiness for execution, the holder of the claim should report his/her monthly pension income in the schedule.



sis in each case on the condition precedent of survival", meaning that the pledgee entitled to collect has a right to collect in case of a lack of overall maturity only if it is necessary to satisfy pensions that have already matured.

Through the sole collection right of the (if applicable, former) managing shareholder, the option is opened up for creditors of the managing shareholder to execute present and future claims to occupational retirement, even if these are only due on a pro-rated basis.

In the best-case scenario, however, a reinsurance policy pledged to an (ex) managing director can be protected to the extent of Section 851c Code of Civil Procedure. A prerequisite for this is that the managing director is named as an insured person in the insurance policy<sup>71</sup>. In this case, it is also necessary for a (contractual) lump-sum-option not to be provided for (any longer) in the insurance policy at the time of execution. The only other decisive factor in this case is the provisions in the insurance policy, and not any conditions in the managing director's employment contract.

If the GmbH insolvency administrator makes use of his set-off option, for example as a result of manager liability<sup>72</sup>, the reinsurance coverage is usually lost<sup>73</sup>. "Statistically, insolvency applications are filed 23 months too late"<sup>74</sup>. Around

---

<sup>70</sup> Federal Court of Justice, judgment of 11 April 2013, Case ZR 176/11.

<sup>71</sup> Federal Court of Justice, judgment of 22 August 2012, Case ZB 2/11.

<sup>72</sup> cf. for example, the key words "IHK" and "manager liability" in an Internet search engine.

<sup>73</sup> Fiala, Johannes / Lohkamp, Rüdiger, Probleme bei der Gestaltung einer "insolvenzsicheren" Pensionszusage an einen mehrheitsbeteiligten Gesellschafter-Geschäftsführer – Eine Kritik des Modells der verpfändeten Rückdeckungsversicherung, in: VersR 2006, p. 331 et seqq.

<sup>74</sup> Pühn Rechtsanwälte, Client Circular 07/2011, p. 1, [http://www.puehn.de/infob/i\\_puehn\\_jul\\_11.pdf](http://www.puehn.de/infob/i_puehn_jul_11.pdf)

72% of all insolvency applications to my specialists are affected<sup>75</sup>. In our opinion, 98% of all business insolvencies are applied for about one year after the business was ready for insolvency"<sup>76</sup>, cf. Section 64 German Limited Liabilities Companies Act.

### ***3.4 Execution before Insolvency Is not Rectified by means of the Insolvency proceedings.***

After the actual insolvency proceedings with a duration of around one year, the regular six-year good conduct phase follows, Section 287 II Insolvency Code<sup>77</sup>. In many EU Member States, domestically recognized<sup>78</sup> insolvency proceedings (sometimes without a good conduct phase) result in a discharge from residual debt. If affected parties in the EU,<sup>79</sup> for example, move to England or France<sup>80</sup>, private insolvency proceedings<sup>81</sup> in one of those countries may take only a few months or up to two years.

---

<sup>75</sup> Euler Hermes Kreditversicherungs-AG, Antrag häufig zu spät gestellt, in: Wirtschaft Konkret no. 414, p. 8 et seqq., <http://www.wirtschaft-konkret.de/de/dokumente/414-ursachen-von-insolvenzen.pdf/414-ursachen-von-insolvenzen.pdf>

<sup>76</sup> Haarmeyer, Hans, Starke Gläubiger im Insolvenzverfahren?!, in: [http://www.kommunalkassenverwalter.de/files/vortrag\\_-\\_der\\_einfluss\\_der\\_glaebiger\\_im\\_insolvenzverfahren\\_\\_pruefungs-\\_und\\_einflussmoeglichkeiten\\_.pdf](http://www.kommunalkassenverwalter.de/files/vortrag_-_der_einfluss_der_glaebiger_im_insolvenzverfahren__pruefungs-_und_einflussmoeglichkeiten_.pdf)

<sup>77</sup> In accordance with an amendment, the good conduct phase will be cut to either 3 or 5 years in the future.

<sup>78</sup> Federal Court of Justice, decision of 18 September 2001, Case ZB 51/00; Directive (EC) No 1346/2000 of the Council of 29 May 2000.

<sup>79</sup> Brennecke, Harald / Otépková, Eva, Insolvenz und Restschuldbefreiung in Europa – Ein Vergleich der Insolvenzordnungen der Länder der EU, Karlsruhe 2009, p. 19 et seqq., p. 34 et seqq.; DACH, Europäische Anwaltsvereinigung e.V., DACH, Europäische Anwaltsvereinigung e.V., p. 1 et seqq.

<sup>80</sup> Kern, Dietmar, Das neue Insolvenzverfahren für Privatpersonen und Unternehmer, Herrenberg 2009, p. 62 et seqq.

After the discharge from residual debt, it is often<sup>82</sup> possible for the full pension to be made available again. For this to be the case, however, the pension must not mature in one go or be subject to execution, cf. Sections 301 et seq. Insolvency Code.

### ***3.5 Private Retirement Pension through Life Insurance from Switzerland***

In Switzerland, life insurance<sup>83</sup> enjoys special protection from execution, in accordance with Art. 70 II Swiss Insurance Contracts Act, if the insured party has irrevocably benefitted a third party, and in accordance with Art. 80 Insurance Contracts Act if spouses and/or descendants have been irrevocably benefitted. Claims by the insured party and the beneficiaries against the insurer are exempt from execution in case of benefits of this kind<sup>84</sup>, and therefore cannot be attached<sup>85</sup>. Spouses and descendants automatically legally take the place of the insured party at the time of a (first) execution or insolvency, Art. 81 I Insurance Contracts Act.

---

<sup>81</sup> Insolvency tourism opens up the way to France (e.g., to Alsace) and England, where those in professions with professional organizations often waive their authorization in advance, but can often get it reinstated afterwards without any problem.

<sup>82</sup> This does not always apply, however, because effective execution proceedings before the insolvency are not affected, so could still result in an entitlement to utilization because discharge from residual debt only results in the liabilities becoming natural obligations about which no claim can be made in court; cf. Sections 301, 302 Insolvency Code.

<sup>83</sup> From the point of view of an actuary, it should be noted that Swiss life insurance companies, unlike those domiciled in the EU, primarily in Germany, have already implemented Solvency-II, which has cut the insolvency risk (previously around 1% p.a.) approximately in half.

<sup>84</sup> Roth, Daniela D., *Versicherungsansprüche im Konkurs*, in: *Insolvenz- & Wirtschaftsrecht* 03/1998, p. 107 et seqq. 110.

Consequently, this involves neither a "benefit" as defined under Section 134 Insolvency Code nor a "legal transaction" as defined under Section 133 Insolvency Code.

The unpaid "designation" of a third party as the beneficiary if a year has not yet passed until execution or insolvency (remedy of avoidance), Art. 286 I Swiss Debt Collection and Bankruptcy Act: A case in which the debtor has acquired a life annuity for itself or for a third party is considered the same as a gift.

If the insured party had the intention of causing damage to its creditors and if the beneficiary was positively aware of this, the contest period is five years, Art. 288 Swiss Debt Collection and Bankruptcy Act. The burden of proof is on the creditor. The Swiss insolvency administrator has the initial right to contest, not the foreign creditors or insolvency administrator, Art. 171 Swiss International Private Law Act. Foreign decisions on contest could not be executed in Switzerland because they are not covered by the Lugano agreement<sup>86</sup>.

German enforcement orders and insolvency procedures can be recognized via 170 I Swiss International Private Law Act, which opens up the way for creditors to contest. In any case, there will be a parallel insolvency procedure (ancillary insolvency in accordance with Art. 170 - 174 Swiss International Private Law Act) in Switzerland under Swiss law, which is only available to domestic and foreign pledgees, as well as Swiss creditors, Art. 219 Swiss Debt Collection and Bankruptcy Act<sup>87</sup>.

---

<sup>85</sup> Frick, Joachim / Rimle, Alois, Vermögensschutz mittels schweizer Lebensversicherung, in: Der Schweizer Treuhänder 12/03, p. 1007 et seqq.

<sup>86</sup> BGE, 129 III 683 et seqq.

<sup>87</sup> Blitz, Jan, Sonderinsolvenzverfahren im Internationalen Insolvenzrecht, p. 73 et seqq.

Otherwise, the exemption from execution remains for domestic and foreign insured parties. In the ancillary insolvency proceedings, the territorial principle will apply<sup>88</sup>, meaning that the physical location of the policy<sup>89</sup> may be the determining factor – in case of receivables against Swiss insurers, the location in Switzerland will be fabricated if Swiss law was selected in a choice of law clause, Art. 166 et seqq. Swiss International Private Law Act.

It would also be conceivable that the Swiss insurer has a branch or subsidiary at the location outside of Switzerland where the insolvency is taking place or where the creditor is located, and the execution will take place there.

It could be problematic that during the time of the German Confederation (1815 - 1866), some Swiss cantons entered into interstate agreements with the Kingdom of Bavaria (1834) and Saxony (1837), as well as the crowns of Württemberg (1825)<sup>90</sup> on equal treatment in case of insolvency. In the area of application of these State agreements, there is no need<sup>91</sup> for an application for recognition of the German insolvency proceedings in Switzerland in accordance with Section 166 International Private Law Act; rather the rights of the German insolvency administrator focus on the contents of the international treaties<sup>92</sup>, which supersede the Swiss Debt Collection and Bankruptcy Act (only in this

---

<sup>88</sup> In Germany, the principle of universality has applied since the Federal Court of Justice judgment of 11 July 1985 (Case ZR 178/85), so foreign insolvency administrators can include domestic assets in the assets.

<sup>89</sup> Note: If the submission of the insurance policy is necessary in order to assert the claim, this would have to have been agreed upon with the VR. The policy can be stored somewhere.

<sup>90</sup> cf. Meili, Friedrich, *Modern Staatsverträge über das international Konkursrecht*, p. 24 et seqq.; Blaschczok, Christine, *Die schweizerisch-deutschen Staatsverträge auf dem Gebiet des Insolvenzrechts*, in: ZIP 02/83, p. 141 et seqq. with additional references

<sup>91</sup> dissenting BGE 5A 134/2009 of 07 July 2009, BGE 129 III, p. 683 et seqq.

<sup>92</sup> Wüthrich, Karl, *Kann eine ausländische Konkursmasse in der Schweiz eine Klage gegen einen ihrer Schuldner mit Sitz oder Wohnsitz in der Schweiz einleiten?*, in: <http://www.wenger-plattner.ch/files/downloads/files/9f889ab402f1fdcc03bd728804e92be2/WuK-Auslaendische%20Konkursmasse%20in%20der%20Schweiz.pdf>

respect) and cannot prevent the performance of an internal insolvency proceeding under the management of the insolvency office with the power of disposition of a Swiss insolvency administrator in accordance with Art. 166 et seqq. International Private Law Act<sup>93</sup>. This affects in particular bank accounts with credit institutions in Switzerland.

The insolvency privilege of the Insurance Contracts Act is a material insurance policy right – not an execution or insolvency right – which changes the allocation of assets. No breach against "public order" is seen because no indispensable ideal is affected: the Insurance Contracts Act does not place individual creditors at a disadvantage. The same result of the asset allocation could also be achieved, for example, by means of (timely) assignment, the Insurance Contracts Act is an integral component in this financial product and finally the debt status of the receivable is decisive with regard to material rights to receivables rights (*lex causae*)<sup>94</sup>.

Only insofar as an intergovernmental reciprocal agreement exists does the principle of legal assistance apply instead of a purely territorial principle, Art. 166 I c Swiss International Private Law Act. The Swiss Federal Court<sup>95</sup> considers the agreement as cantonal law, so that Sections 197 et seqq. Swiss Debt Collection and Bankruptcy Act – not Sections 129 et seqq. Insolvency Code –

---

<sup>93</sup> Krüger, Thomas, Die grenzüberschreitende Verfolgung insolvenzrechtlicher Ansprüche durch eine deutsche Insolvenzmasse in der Schweiz, p. 3, in [http://www.becker-krueger.de/blog/wp-content/uploads/2009/02/die\\_grenzueberschreitende\\_verfolgung\\_insolvenzspezifischer\\_anspruch\\_in\\_der\\_schweiz.pdf](http://www.becker-krueger.de/blog/wp-content/uploads/2009/02/die_grenzueberschreitende_verfolgung_insolvenzspezifischer_anspruch_in_der_schweiz.pdf)

<sup>94</sup> Korinek, Stephan, Kann für inländische Versicherungsnehmer das Konkursprivileg für Ehegatten oder Nachkommen nach dem schweizerischen Versicherungsvertragsgesetz gelten?, in: Die Versicherungsrundschau 5/2000, p. 64 et seqq.

<sup>95</sup> BGE, 109 III 83 et seqq., decision of 16 November 1983; dissenting High Court of the Canton of Zurich, decision of 22 November 2011, Case N100041-O/U.

are applicable<sup>96</sup>. A German insolvency administrator can be actively legitimized through Art. 171 International Private Law Act, in accordance with the ranking there for action for annulment in accordance with Art. 285 et seqq. Swiss Debt Collection and Bankruptcy Act<sup>97</sup>.

### ***3.6 Private Retirement Pension through Life Insurance from Liechtenstein***

The Liechtenstein life insurance cover is often promoted with "princely privileges", which do not often apply to German investors: an insolvency privilege, insurance secrecy and (alleged) tax exemption<sup>98</sup> during the saving phase<sup>99</sup> are mentioned. It is not that securities deposits and cash accounts are held in the name of a life insurance company; the customer has only agreed with the insurer investment guidelines and provided it with the monetary assets for investment.

Reference should first be made here to the International Private Law, in particular Section 9 Introductory Act to the Insurance Contracts Act old version<sup>100</sup>. Therefore, a single "intermediary"<sup>101</sup> for the insurance contract is sufficient in

---

<sup>96</sup> Spahlinger, Andreas, *Sekundäre Insolvenzverfahren bei grenzüberschreitenden Insolvenzen*, p. 74 et seqq., 78.

<sup>97</sup> Krüger, Thomas, *loc.cit.*, p. 6.

<sup>98</sup> cf. Federal Ministry of Finance letter of 01 October 2009, reference IV C 1 – S 2252/07/0001, margin note 34a et seqq.

<sup>99</sup> Diehl, Jörg, *Steuerhinterziehung: Verraten und verkauft mit der Credit Suisse*, *Der SPIEGEL* of 18 July 2012, in: <http://www.spiegel.de/wirtschaft/service/steuerhinterziehung-mit-lebensversicherungen-bei-der-credit-suisse-a-845070.html>

<sup>100</sup> With effect as of 17 December 2009 replaced by Rome I Regulation (EC) 593/2008 of 17 June 2008.

<sup>101</sup> Option: the mediation of insurers without permission in accordance with Sections 5 and 6 German Insurance Supervision Act represents an administrative offence on the part of the intermediary (e.g., credit institution, insurance broker), so that Section 823 II Civil Code is affected. This is grounds for liability for performance, in particular if the insurer is later una-

Germany for a choice of law to be excluded and for the German Insurance Contracts Act to be applied as mandatory, so no insolvency privilege at all can be touched<sup>102</sup>. The Liechtenstein life insurance policy is also unsuitable to legal-

---

ble to perform, cf.: Higher Regional Court Hamburg, judgment of 03 July 2002, Case 14 U 36/02.

<sup>102</sup> Case example: insurers have "sales service partners" in Germany for the distribution of prospectuses and for the distribution of information to insurance brokers. Some brokers support their customers directly from foreign countries, for the conclusion of contracts there, and then also have the commission deposited in the foreign country without being taxed. There are a few suppliers from Luxembourg and Liechtenstein with life insurance policies with natural persons as the insured party with their usual place of residence in Germany at the time of the conclusion of the contract (often through intermediaries, e.g., insurance brokers) about which the following details are known (not conclusive):

Art. 7 Para. 3 b or c Rome I Regulation applies here: according to b, either the right of usual residence on the part of the insured party or in accordance with c), the right of nationality of the insured party – c applies only to life insurance policies. Accordingly, in principle, the choice of law Liechtenstein would obviously be ineffective from a German point of view, if Liechtenstein is neither the State of usual residence nor the nationality of the insured party. If the parties have not decided on a choice of law or have decided on an ineffective choice of law, in accordance with Art. 7(3) sentence 3 Rome I Regulation, such a contract shall be governed by the law of the Member State in which the risk is situated at the time of conclusion of the contract. In case of life insurance, this is the State, in which the insured party has its usual place of residence.

Exception from the exception: the Member States may grant the parties greater contractual freedom of the choice of the law (opening clause Art. 7(3) sentence 2 Rome I Regulation). Germany intentionally made no use of the option under Art. 7 sentence 2 Rome I Regulation in contrast to other States. German law therefore clearly applies as compulsory for life insurance contracts concluded after 17 December 2009 with insured parties resident in Germany. In accordance with Art. 4 of Rome I Regulation, this also applies as mandatory for EEA States (Norway, Liechtenstein, and Iceland), (only allegedly) even in case of correspondence insurance.

The insured party could, however, also be a legal entity (company, foundation, trust foundation, institute), for example with regard to reinsurance of an occupational pension scheme. The insurance provider and the insured party could belong to different States. In addition, a configuration there would be to select an insurance provider outside of the area of application of the Rome I Regulation and to consider that where possible a global policy is not a life insurance policy at all, depending on the configuration and then would also have to be treated completely differently for tax purposes.

It would also be possible, if the insured party is in a foreign country (e.g., in case of a group insurance company, or if a foreigner in another company enters into an insurance contract with a German person as the insured party, to then transfer it to the German person as an insured party, thus as a "1-day policy").

Irrespective thereof, however, GATT as a contract under international law has secondary priority to secondary community law (EU guidelines and EU directives) in the EEA, Section 300 VII TEEC – or also the OECD "CODE OF LIBERALISATION OF CURRENT INVISIBLE OPERATIONS": the would also be the reason why the (EU) legislators are starting with brokerage because the home-foreign insurance itself cannot be banned. In any case, both the use of "intermediaries" and the brokerage of insurance without a branch of the insurer in the country would be dangerous with regard to a free choice of law or prohibited. In case of real home-foreign insurance, i.e. without the use of intermediaries, there is no also no limitation for insurers and insured parties, such as, for example, in case of a free choice of law. Even in case of a trip accompanied by an intermediary, broker, advisor, etc. to an insurer in a foreign country, the home-foreign insurance, the home-foreign insurance is excluded as a term.



ize "tax neutral money"<sup>103</sup>. With regard to the free movement of services in the EU and in the EEA, foreign insurers are not prevented from offering their policies via German insurance brokers<sup>104</sup>.

In the case of a real home-foreign insurance policy<sup>105</sup>, i.e. the conclusion of a contract without the involvement of an intermediary, the choice of law between German insured parties and foreign insurers is possible<sup>106</sup>. In Liechtenstein, in accordance with the Enforcement Regulation only domestic files, judgments, and documents are recognized upon enforcement and insolvency, Art. 1 Enforcement Regulation – unless there are treaties that exist, Art 52 Enforcement Regulation<sup>107</sup>. In case of revocable benefitting of spouses, unmarried life partners or descendants, the insurance claim is not subject to execution or mandatory enforcement, neither for the insured party nor the beneficiary, Art. 78 Insurance Contracts Act. The insurance claim would be exempt from execution for each insured party if there is an irrevocable benefit in place, Art. 77 II Insurance Contracts Act and the 1-year period for contesting of a gift are observed.

---

<sup>103</sup> Case example: Richard Reich, a German citizen, has one million in illicit money in Zurich. In order to "legalize" this money, he gets the following tips from banks in the Alps:  
- The money could be transferred anonymously to a German fund (managed through a subsidiary of the Swiss parent company in Germany) with settlement tax deducted (report in the Swiss *Sonntagszeitung* on the Sauerborn fund). Alternatively, tax-free investment in a unit-linked life insurance could be considered.

- The purchase of a zero bond – after 10 years everything (under tax and criminal law) would be subject to the statute of limitations. Alternatively, the customer could waive any interest on its accounts.

Drawback: the statute of limitations in Section 261 German Penal Code had not yet then begun (for example after 10 years) – in accordance with the theory of "valuation unit" (Fuchs, Thomas, *Geldwäsche, Verjährung und Bewertungseinheit, wie passt das zusammen?*, Mannheim 2004.) - cf. Section 78 III No. 4. Penal Code, Sections 376, 370 III 2 No.1 Tax Code. Some bail payments to the judiciary are problematic in this respect, but also some politically motivated transactions by government institutions in Germany.

<sup>104</sup> Basedow, Jürgen, *Das neue Internationale Versicherungsvertragsrecht*, in: *NJW* 1991, p. 785 et seqq., 786.

<sup>105</sup> Configuration option: as an alternative, the acquisition of a "used" life insurance policy that already existed in a foreign country was also considered, by means of a purchase contract and assignment in a foreign country.

<sup>106</sup> Basedow, loc.cit. p. 791, 792.

<sup>107</sup> Treaties exist with Switzerland and Austria, but not with Germany.

The Liechtenstein right to contest in accordance with Art. 64 – 75 Legal Certainty Regulation of 26 February 1923, however, takes priority over the insolvency privilege<sup>108</sup>, Art. 80 Insurance Contracts Act. Art. 75 Legal Certainty Regulation determines that the material insolvency right at the place of residence of the debtor is to be applied, alternatively that of the debtor's place of residence – i.e. for people residing in Germany Sections 3 et seqq. Contesting Act and Sections 129 et seqq. Insolvency Code. Therefore, Art. 6 Introductory Act to the German Civil Code (public order) cannot be affected initially. In any case, Art. 75 III Legal Certainty Regulation determines that the law that is gentler on the contest opponent is to be applied<sup>109</sup>. In case of the contesting of gifts and excessive debt, the period is one year (Art. 65-66 Legal Certainty Regulation) in case of a disadvantage to creditors with the burden of proof for all constituent elements with the creditor is "forever" (Art. 67 Legal Certainty Regulation). In any case, contesting by means of a complaint is limited to five years from the contestable legal act, Art 74 I Legal Certainty Regulation. After the expiry of the applicable contest periods, despite the priority of the contest right (Art. 80 Insurance Contracts Act), the insolvency privilege (Art. 77 et seq. Insurance Contracts Act) can result in exemption from execution. A prerequisite for this, however, would also be the effective choosing of Liechtenstein law, which, however, would only be possible by means of a home-foreign insurance policy.

The main insolvency proceedings take place at the location of the main place of residence, Section 3 I Council Regulation on insolvency proceedings. Neverthe-

---

<sup>108</sup> Gössler, Jörg, Die liechtensteinische Lebensversicherung: Zivil- und steuerrechtliche Aspekte aus deutscher Sicht, in: Liechtenstein-Journal 01/2010, p. 3 et seqq., 5.

less, a creditor or insolvency administrator would first of all have to take legal action in Liechtenstein because of a lack of a treaty with Germany (agreement on enforcement).

With regard to conflict of laws, governing law is to be observed, Sections 19 Contesting Act, 339 Insolvency Code. According to this, on the one hand, it depends on the choice of law and on the other hand, in case of movable assets, on transfer in advance to the foreign country. If an item (for example an insurance policy) is then brought back into the country, a change of law will occur, meaning that the execution and contesting in turn are assessed under domestic law<sup>110</sup>.

If an insurance policy remains in a foreign country, there is nevertheless an issue that the insured party may be required to surrender it, in particular if in case of execution or insolvency, the policy is not in the possession of the beneficiary. Section 97 II Insolvency Code obliges the insolvency debtor to give the insolvency administrator the necessary approvals and authorizations<sup>111</sup> in particular for seizure with regard to assets in foreign countries<sup>112</sup>. This follows from the active handover obligation on the part of the insolvency debtor, as well as its disclosure and participation obligations, Sections 20 I, 22 III 3, 97, 148 Insolvency Code. Indications about tax havens justify requesting a foreign power of

---

<sup>109</sup> Lennert, Philipp / Ponath, Gerrit, Die liechtensteinische Stiftung: Ein Gestaltungsinstrument zur Asset Protection für deutsche Privatpersonen, in *Private, Geld-Spezial*, 2009, p. 32 et seq.

<sup>110</sup> Oertzen, Christian / Ponath, Gerrit, *Asset Protection im deutschen Recht*, p. 102.

<sup>111</sup> Cologne Higher Regional Court, decision of 28 April 1986, Case 2 W 34/86; Koblenz Higher Regional Court, Decision of 30 March 1993, Case 4 W 91/93; Federal Court of Justice decisions of 18 September 2003, Cases ZB 74/03 and 75/03.

<sup>112</sup> The usually recommended storage of the policy with the insured party would therefore be as ineffective as storage in a safe in a foreign country.

attorney, even without concrete signs of assets in certain States, in particular if domestic insolvency proceedings in foreign countries are not recognized directly in accordance with the principle of universality<sup>113</sup>. In addition, the insolvent person is obliged even during the opening proceedings to release, "honorary professionals" from professional secrecy. This follows from the rule that mandatory sovereign enforcement and insolvency proceedings legally cancel our private secrecy<sup>114</sup>.

For enforcement, coercive means, such as custody, can be used. In addition, blocking of post could be considered, Section 99 Insolvency Code. With regard to the tax authorities, the substantiated statement of reasons by the insolvency administrator is sufficient as information, Section 30 Tax Code<sup>115</sup>.

---

<sup>113</sup> Federal Court of Justice, loc.cit.

<sup>114</sup> Federal Court of Justice, decision of 02 December 2009, Case I ZB 65/09. If, for example, enforcement is performed against a lawyer, the lawyer must also disclose the client's name, the grounds for the receivable, and the level of the receivable, because irrespective of the legal prohibition of assignment in accordance with Section 49 b BRAO, these are subject to execution (BGHZ 141, 173, 176). A third-party declaration can therefore not be refused with reference to professional confidentiality, Section 203 Penal Code.

<sup>115</sup> Federal Finance Court, judgment of 19 March 2013, Case II R 17/11.

## 4 RESULTS

<u>Exemption from Execution (Deposit Phase)</u>	<u>Capital Range</u>
German life insurance	in general none
On request to court Section 765a Code of Civil Procedure	minimum living wage
Burial insurance Section 850 b Code of Civil Procedure	up to EUR 3,579 capital
Riester in accordance with Section 851d Code of Civil Procedure	up to about EUR 50 pension
Rürup in accordance with Section 851c Code of Civil Procedure	up to about EUR 500 pension
State pension insurance	unlimited
Occupational pension scheme	unlimited
Swiss life insurance	unlimited for spouse and children
Liechtenstein life insurance	same as Swiss; and for life partner

Table 2: Exemption from execution

#### **4.1 Privileged Statutory Retirement Pension in the Deposit Phase**

Both in deposits to statutory pension insurance and also in case of – depending on the articles of association – compulsory membership and payment into professional pension schemes, the deposits already made are in principle protected from execution by creditors even in case of insolvency.

#### **4.2 Dependency on Risks relating to Politics, as well as Capital Markets**

Workers and employees have no alternative but to pay into German Pension Insurance<sup>116</sup> and currently have a prospect of up to more than an average<sup>117</sup> of EUR 700 in pension in former East Germany. The trend continues to be downward and there are usually deductions from the pension amount received for health insurance and income tax of up to 25%<sup>118</sup>.

Also with regard to the level, the amount of the retirement pensions from professional associations (doctors, notaries, tax advisors, lawyers, dentists, architects, public auditors) are regularly expected to fall in future, possibly by more than 50%<sup>119</sup>, in individual cases, by more than 75%.

---

<sup>116</sup> Around 20% contribution, limited up to "contribution measurement limit".

<sup>117</sup> cf.: <http://www.cecuc.de/durchschnittsrente.html>.

<sup>118</sup> cf.: <http://www.swr.de/betrifft/betrifft-rente-altersvorsorge-riester/-/id=98466/did=12585170/nid=98466/c9l6mb/index.html>.

<sup>119</sup> Thieme, Matthias, Das Kartell der Geheimniskrämer, in: Capital 10/2012, p.132 et seqq.

Lüneburg Higher Administrative Court decided that no obligatory member can stop their contribution payments "because of an allegedly defective investment strategy on the part of the insurance scheme that did not take into account the effects of the financial crisis"<sup>120</sup>.

Individual insurance schemes already had to grant that all hidden reserves are used up. Investment losses from the State and financial crises since 2007/2008, the use of obsolete mortality tables, as well as the retirement income (tax) act are allegedly the cause of a cut in pensions of up to more than 50%. Munich Administrative Court<sup>121</sup> decided that the individual member of the pension scheme is not entitled to any detailed disclosure, for example for risk management.

Wouldn't any normal investor be entitled to information on kickbacks because of the appearance of double management costs, similarly to the occupational pension scheme in pension funds<sup>122</sup>, and then leave it to the judiciary to determine whether it could be a case of embezzlement or fraud if there was a suspicion of this<sup>123</sup>?

The low market interest rate<sup>124</sup>, but also the investment risk in foreign government bonds and alternative investments do not enable all pension funds to anticipate returns of three to four per cent in the long term. Experts have already calculated when the assets of individual pension schemes are likely to be depleted if the previous increases and levels of pensions continue. It will not come

---

<sup>120</sup> Lüneburg Higher Administrative Court, decision of 03 February 2012, Case 8 LA 156/11.

<sup>121</sup> Munich Administrative Court, judgment of 21 October 2010, Case M 12 K 10.2643.

<sup>122</sup> Nuremberg Regional Court, judgment of 01 February 2013, Case 9 O 1021/11; Federal Court of Justice judgment of 19 December 2006, Case XI ZR 56/06.

<sup>123</sup> Higher Regional Court Stuttgart, judgment of 16 March 2011, Case 9 U 129/10 with additional references

to insolvency because the articles of association of the pension associations allow them to reduce their benefits regularly. After the entry of the insured event, pensions, including value-preserving dynamisation, are protected, as long as all recipients of pensions are not subject to a system-appropriate reduction, which means that by then redistribution at the expense of young pension applicants and for the benefit of pension recipients has factually occurred<sup>125</sup>.

In simple terms, the amount of savings for the same level of capital-covered pension has more than doubled in the last decade and a half as a result of the low level of interest rates because the compounding effect hardly affects interest anymore.

### ***4.3 Limitation of Private Retirement Pensions that Are Exempt from Execution***

Essentially, it was only through the introduction of Section 851c German Code of Civil Procedure in 2007 that the possibility for the setting up of capital-covered private pensions that are exempt from execution amounting up to more than EUR 500 per month was created.

Further protection of assets for a retirement pension requires initiative on the part of the person affected, in particular an application under Section 765a Code of Civil Procedure based on "severity", and in case of success, this would be granted to relieve the State welfare system of ensuring a subsistence level of income.

---

<sup>124</sup> Timing since introduction of the ECU 1998, at the latest at the time of the introduction of the euro in 2002.



#### **4.4 Legally Limited Exemption from Execution in the Pay-out Phase**

In the pay-out phase, protection of income takes the form of regular monthly limited allowances in case of pledging and insolvency, Sections 850 et seqq. Code of Civil Procedure.

If necessary, there are further opportunities abroad to protect family or pension assets in any amount during the deposit and pay-out phase from access by creditors, in particular by means of life insurance in Switzerland and Liechtenstein. However, this also requires initiative on the part of the person affected, because insolvency protection by means of the "insolvency privilege" cannot be achieved in a legally secure manner if a broker or financial services provider is used to purchase foreign life insurance policies.

#### **4.5 Asset Protection by Protecting the Family Home**

The Rhine-Westphalian Institute for Economic Research has determined that the average household retains less than half of its net income due to fixed costs, especially for costs relating to a residence<sup>126</sup>. Therefore, the question arises of whether insolvency protection for the family residence can be arranged in a sufficiently reliable manner?

Because this could help to compensate for or supplement the existing domestic restrictions on income that is exempt from execution in the pay-out phase for

---

<sup>125</sup> Federal Administrative Court, judgment of 21 September 2005, Case 6 C 3.05.

retirement pensions, as well as the limitations on asset accumulation for a private capital-covered pensions.

#### 4.5.1 The Family Home as Part of the Retirement Pension

Pensions are measures to secure the subsistence level in old age and upon leaving the labour force. Pensions relate to any area involving assets that relate to claims to capital or annuities (to secure against biometric risks).

Pensions are fundamentally not capital investments, but security against the risk of longevity. Until you need to secure yourself against this, you do not need it; instead, you could invest your capital elsewhere in a more lucrative way. To hedge against the longevity risk at the age of 80, it is sufficient to invest assets of approximately 20 times an annual pension, at the age of 85 years, 15 times – i.e. with a capital cover to invest with consumption. The background is the experience that at age 80 it is no longer possible to sit out a stock market downturn, so the majority of the assets have to be invested very securely and therefore at low interest. Without capital consumption, one would need up to more than 50 times an annual pension because this has to be generated via only a low interest rate. With a pension at this retirement age, through collective security, but

---

<sup>126</sup> cf. [http://www.focus.de/finanzen/steuern/einkommen-so-viel-bleibt-zum-leben\\_aid\\_391787.html](http://www.focus.de/finanzen/steuern/einkommen-so-viel-bleibt-zum-leben_aid_391787.html)

without relying on non-binding forecasts, about 17 times or 13 times an annual pension is sufficient<sup>127</sup>.

The family residence (house or apartment), i.e. the owner-occupied property, therefore counts toward a retirement pension. Ownership of an owner-occupied property can be transferred, for example, to a spouse in order to protect it against creditors.<sup>128</sup> Other family members or other natural or legal persons, however, could be considered as beneficiaries<sup>129</sup>.

The statistical risk of insolvency is around 1% annually<sup>130</sup>. In addition, the possibility of occurrence of voluntary liquidation of professional assets over the past few years before or instead of company insolvency has been more than 7 times higher<sup>131</sup>.

#### 4.5.2 Timely Priority Notice Protects against Contestability

If asset protection measures are not performed in a timely manner, there may be a penalty as a result of obstructing the foreclosure<sup>132</sup> (Section 288 Penal Code) and/or for example as a result of attempted bankruptcy<sup>133</sup> (Sections 283 et seqq. Penal Code). The Contesting Act and the Insolvency Act provide that

---

<sup>127</sup> Source: Actuary Schramm, Peter, [www.pkv-gutachter.de](http://www.pkv-gutachter.de)

<sup>128</sup> Fiala, Johannes, Die Insolvenzrisiken der Altersversorgung legal beherrschen, in: V&S 03/2012, p. 14 et seqq.

<sup>129</sup> Solveman, Rachel Emma, A Fortress for Your Money, in: The Wall Street Journal of 15/16 July 2005, p. B1.

<sup>130</sup> cf. [www.statis.de](http://www.statis.de); Bretz, Michael, Insolvenzen in Europa – Jahr 2011/12, p. 6 et seq.

<sup>131</sup> Kranzusch, Peter, Ökonomische Resultate von Unternehmensinsolvenzverfahren, p.11, in: <http://www.ifm-bonn.org/assets/documents/Kranzusch-02-11-2009.pdf>

<sup>132</sup> Federal Court of Justice, judgment of 29 April 2010, Case 3 StR 314/09.

disposals of the assets of a debtor are contestable for a certain period of time by creditors and insolvency administrators.

In order to start the period for real estate transfers, it is sufficient, if the future owner has submitted the application for entry in a notice of conveyance approved by it in accordance with Section 883 Civil Code in its favour, because then the legal transaction will be considered to have been performed - even without a conveyance in the land registry if the declaration of agreement of the previous owner has become binding on it and the noted claim to transfer of ownership or granting of rights occurred in the land registry<sup>134</sup>. The legal consequence of Section 883 II Civil Code is that the insolvency administrator no longer has access to the real estate property because the prior notice is insolvency-proof<sup>135</sup>. Section 106 Insolvency Code removes the claim to conveyance on ownership transfer secured by the prior notice from the insolvency procedure overall.

At most, with a time delay, the transfer of the property or the prior notice in the land register can still be successfully contested later in accordance with the Contesting Act or Insolvency Code.

#### 4.5.3 Transfer as an Allocation or Gift Resulting from Marriage

In case of doubt, between spouses, this is not a gift but rather an "allocation resulting from marriage", with the purpose of securing the marital home. Unpaid

---

<sup>133</sup> Federal Court of Justice, judgment of 22 February 2001, Case 4 StR 421/00; Federal Court of Justice, judgment of 23 April 2010, Case 3 StR 314/09.

<sup>134</sup> Federal Court of Justice, judgment of 10 December 2009, Case IX ZR 203/06.

disposals of this kind are subject to a four-year contest period, Section 4 I Contesting Act, Section 134 I Insolvency Code<sup>136</sup>. A requirement for an allocation resulting from marriage is a monetary payment or contribution in kind in favour of the spouse, not, however, a service<sup>137</sup>. The latter would be exempt from execution.

Only in exceptional cases can an allocation to the spouse be used to fulfil an anticipated (already existing) equalization claim (and then the content of the allocation must also be arranged in this way<sup>138</sup>. If, for example, it involves a settlement of equal value for a gain, the disposal of assets is contestable for only two years, Section 138 Insolvency Code.

In case of compensation to a spouse or to a third party<sup>139</sup>, firstly the objective facts and the valuation are decisive<sup>140</sup>, before the question of the main purpose of transfer of assets as a (partially) paid or unpaid transaction.<sup>141</sup> The value of what is to be granted back to the insolvency assets or to a creditor after contesting of the unpaid disposal is determined on the basis of what was removed from the assets of the insolvent person<sup>142</sup>. There is no claim to restitution in case of bona fide acquisition and a lack of enrichment.

---

<sup>135</sup> Higher Regional Court Stuttgart, judgment of 18 August 2003, Case 5 U 62/03.

<sup>136</sup> Federal Court of Justice, judgment of 21 January 1990, Case IX ZR 429; Federal Court of Justice of 13 March 1978, Case VIII ZR 241/76.

<sup>137</sup> BGHZ 84, 361; 127, 48, NJW 1999, 2962.

<sup>138</sup> Higher Regional Court Munich, decision of 28 January 1997, Case 21 W 3421/96, in: NJW-RR 1998, 1144 et seqq.

<sup>139</sup> Federal Court of Justice, judgment of 24 June 1993, Case IX ZR 96/92; Federal Court of Justice of 25 June 1992, Case IX ZR 4/91.

<sup>140</sup> Federal Court of Justice, judgment of 13 March 1978, Case VIII ZR 241/76; Federal Court of Justice, judgment of 26 April 2012, Case IX ZR 146/11.

<sup>141</sup> Kreft, Gerhard, Neue Entwicklungen im Anfechtungsrecht, in: DStR 2005, 1192 et seqq.

<sup>142</sup> Federal Court of Justice, judgment of 13 March 1978, Case VIII ZR 241/76.

#### 4.5.4 Transfer also for Asset Protection

Particularly if from a subjective perspective the transfer of ownership possibly only serves to create a direct disadvantage for creditors (*dolus eventualis*), among other things, and this is accepted with approval<sup>143</sup>, if the new owner is aware of this, it will be subject to the ten-year contesting period, Section 3 I Contesting Act, Section 133 I Insolvency Code<sup>144</sup>. Conditional intent will be assumed if it is no longer possible to satisfy all creditors, even if a certain creditor is given preference only in order to avoid an insolvency application on its part by means of payment<sup>145</sup>. A garnishment lien can be contested in case of targeted promotion by the debtor, as well as a simple bank transfer by the debtor after an official pledge was already in place at the bank<sup>146</sup>.

It is presumed that the new owner was aware if it was aware of the risk of insolvency and therefore that the transaction would be disadvantageous to creditors. Any equivalent compensation is also an indirect disadvantage<sup>147</sup> if the liabilities are increased or the main assets are reduced<sup>148</sup>, and therefore access to the debtor's assets is delayed, made more difficult, or frustrated<sup>149</sup>, for example because a purchase price paid is used<sup>150</sup>. In this respect, both old creditors and

---

<sup>143</sup> Federal Court of Justice, judgment of 06 February 1961, VIII ZR 37/60.

<sup>144</sup> Federal Court of Justice, judgment of 22 April 2004, Case IX ZR 370/00.

<sup>145</sup> Federal Court of Justice, judgment of 27 May 2003, Case IX ZR 169/02.

<sup>146</sup> Federal Court of Justice, judgment of 21 November 2013, Case IX ZR 128/13.

<sup>147</sup> According to the Federal Court of Justice, judgment of 26 February 2012, Case IX ZR 146/11, it is sufficient for a simple insolvency receivable to be revalued for the debt to be deemed as debt incumbent (for example by means of a transfer of agreement). Because for a challenge in accordance with Sections 134, 133 I Insolvency Code an indirect disadvantage to creditors is sufficient, while for Section 133 II Insolvency Code, an indirect disadvantage is necessary.

<sup>148</sup> Federal Court of Justice, judgment of 26 April 2012, Case IX ZR 146/11.

<sup>149</sup> Federal Court of Justice, judgment of 22 December 2005, Case IX ZR 190/02.

<sup>150</sup> Federal Court of Justice NJW 1988, 827.

future new creditors are protected in this respect<sup>151</sup>. The lack or incongruity of the compensation are signs of evidence of intent to cause disadvantage<sup>152</sup>. As a consequence thereof, the laying down of declarations of knowledge and motives with regard to asset protection is to be strictly avoided<sup>153</sup>.

Instead of this, an occasion for the transfer of assets, for example, could be anticipated succession, waiver of a legal portion, settlement of the previous claim for gains, waiver of maintenance (subsequent to marriage), or the settlement of future claims for pension rights adjustment<sup>154</sup>.

#### 4.5.5 Transfer Subject to Reclamation at any Time

The right to alter a legal relationship by requesting the return of the property at any time is ancillary, but rather the other way around, the claim to re-assignment is dependent on the exercise. Then, this right (to alter a legal relationship) can be pledged together with the future claim to re-conveyance or claim to re-conveyance with a suspensive condition and be transferred for collection (dual pledging)<sup>155</sup>.

A future or conditional claim to re-conveyance can be used as security for the previous owner by means of prior notice in the land register, Section 883 I 2

---

<sup>151</sup> Federal Court of Justice, judgment of 20 October 1971, Case VIII ZR 212/69.

<sup>152</sup> Federal Court of Justice, judgment of 17 July 2003, Case IX ZR 272/02.

<sup>153</sup> In many cases, however, occupational pensions, working time accounts or partial retirement models, as well as asset investments in foreign countries already focus commercially on such goals or advantages, which can affect Sections 288, 283 et seqq. Penal Code in particular.

<sup>154</sup> The proof of valuations or a lack of enrichment is unlikely to succeed without an expert opinion. Probability considerations may also be necessary here.

<sup>155</sup> Federal Court of Justice, judgment of 20 February 2003, Case IX ZR 102/02.

Civil Code. This claim, however, is subject to execution on its part<sup>156</sup>. It would, however, be possible to allocate claims of this kind to a third party (foundation, family). When arranging this, possible gift tax should be taken into account. In addition, legal persons can also be "associated parties", which makes possible a two-year contest period, Section 138 II Insolvency Code.

The re-conveyancing claim is part of the insolvency assets – if there is no legal waiver before the initiation of the insolvency procedure – so that the authorized party can no longer dispose of it itself, Sections 35, 36, 81 Insolvency Code.

The creditor in insolvency of a reassignment right secured by a prior notice cannot, even if the property transfer has taken place with consideration of the family connection, apply for or grant the deletion of the prior notice<sup>157</sup>.

The deletion of a re-conveyancing claim in the land registry in order to secure a claim to repayment at any time will not be approved by the insolvency administrator of the previous owner, but rather the opportunity for realization will be taken into account within the insolvency assets.

If the claim to repayment or re-conveyancing is not secured by a prior notice in the land registry, a creditor could execute first and then create the entry of the prior notice by means of a preliminary injunction<sup>158</sup>.

If the repayment right only takes the form of an offer, a legal claim that arises in future only as a result of acceptance could be executed immediately informally.

---

<sup>156</sup> Higher Regional Court Munich, decision of 11 March 2010 - 34 Wx 10/10

<sup>157</sup> Higher Regional Court Munich, decision of 13 May 2009, Case 34 Wx 026/09.

<sup>158</sup> Grziwotz, Herbert, Die Zwickmühle – Gläubiger oder Ehegatte?, in: Legal Tribune of 24 May 2012, <http://www.lto.de/recht/hintergruende/h/privatvermoegen-in-der-insolvenz-die-zwickmuehle-glaebiger-oder-ehegatte/>



An arrangement in which the repayment right is waived on the suspensive condition "in case of mandatory execution or insolvency" because in doing so, the insolvency assets would literally be unethically decreased at the last second, which contradicts the principle of equal satisfaction of creditors<sup>159</sup>.

In contrast, it would be permitted to continue to have access to a right of reassignment, which would have to have occurred before the initiation of insolvency proceedings, immediately within the framework of an agreement on a suspensive condition, even if the condition occurs immediately afterward<sup>160</sup>. Rights with conditional justification are only treated as already existing if the condition only occurs after the initiation of insolvency proceedings<sup>161</sup>. This provides an opportunity for an arrangement for the transfer of assets to third parties, irrespective of who might be the beneficiary<sup>162</sup>.

In this respect, a termination option (in connection with further disposition) may at best be damaging, Section 103 Insolvency Code. Otherwise, "exercising of a termination right" can be the "suspensive condition for the transfer of rights". A transfer of rights on a suspensive condition, for example in case of a deterioration in assets, delay, other contractual breach, does not fail, however, because it is solely dependent on the will of the entitled party<sup>163</sup>. The further transfer can

---

<sup>159</sup> Federal Labour Court, judgment of 16 May 1978, Case 3 AZR 783/76 in DB 1978, 1843; Reich Court judgment of 28 January 1918 in RGZ 92, 105; Reich Court judgment of 13 February 1932 in: JW 1932, 1655, Federal Court of Justice, judgment of 16 December 1957 in: BGHZ 26, 185; Federal Court of Justice, judgment of 06 February 1961 in: WM 1961, 671.

<sup>160</sup> Federal Court of Justice, judgment of 17 November 2005, Case IX ZR 162/04.

<sup>161</sup> Federal Court of Justice, loc.cit.: "Not only the unlimited transfer of a conditional right is insolvency-proof, but also the transfer of an unconditional right with a condition (BGHZ 155, 87, 92 et seq.). The decisive factor is whether the right had already been excluded from the assets of the debtor at the time of the initiation of insolvency proceedings, meaning that there was no longer an option for it get it back based solely on its own decision", with reference to BGHZ 155, 87, 92 and BGHZ 70, 75, 77.

<sup>162</sup> Configuration option: that means that a new owner is needed without an option for recovery by the previous owner, however, with the option of further disposal in favour of third parties with a suspensive condition.

<sup>163</sup> Federal Court of Justice, loc.cit.

be made to natural or legal persons, for example a trustee or a foundation. The next generation of the family may benefit, or other third parties. The deadlines for contest must also be taken into account here if an enrichment would result and/or the good faith of the beneficiary is questionable.

If a claim to a reassignment as a result of prior notice in the land register is secured from the beginning of the transfer of the real estate, not subsequently, in case of insolvency there will objectively be no disadvantage to creditors in place in case of insolvency<sup>164</sup>. Finally, the recipient will therefore simply be enriched by a real estate property that is (already) encumbered in this respect.

#### 4.5.6 Transfer subject to Repayment After Failure of Marriage

Allocations resulting from marriage are generally only taken into account financially in settlement of the gain. They can generally only be recovered objectively within very narrow limits<sup>165</sup>, often only concurrently in exchange for financial settlement<sup>166</sup>, in particular of value increases, so that an objective repayment clause in the notarial transfer contract is almost always required, as well as the setting out of the necessary subjective ideas of the spouses in terms of an allocation resulting from marriage<sup>167</sup>.

It is recognized in this process that spouses can provide notarially for deviations from the legal provisions with regard to the nature of the distribution of the

---

<sup>164</sup> Federal Court of Justice, decision of 13 March 2008, Case IX ZB 39/05.

<sup>165</sup> Federal Court of Justice FamRZ 1977, 458.

<sup>166</sup> Federal Court of Justice FamRZ 2007, 877.

gain<sup>168</sup>. Any determined settlement claims to gains cannot be inherited in accordance with Section 1378 III Civil Code, they are non-transferrable and cannot be entered in the land register in case of execution of this future claim. Only at the time of divorce without the ending or lifting of the legal matrimonial property regime, i.e. without a claim to the gain, is the execution of the gain devoid of purpose.

According to the wording of Section 852 II Code of Civil Procedure, claims to settlement of gains can only be executed if they are either contractually recognized or have become pending in court as a result of the filing of a complaint, Section 261 I Code of Civil Procedure.

In order for a repayment right to be subject to the settlement of gains, the transfer of assets must be set up for the duration of the functioning marriage (allocation resulting from marriage) with the business principle that any repayment claim during this period will necessarily be cancelled<sup>169</sup>. Then this repayment right, however, may not exist "at any time" and then the settlement of gains may not be excluded by means of a marriage contract during a lifetime<sup>170</sup>. In this respect, a "modified community of gains" would be particularly damaging<sup>171</sup> because it only provides for a settlement of gains at the ending of the marriage as

---

<sup>167</sup> Federal Court of Justice, judgment of 28 March 2006, Case X ZR 85/04.

<sup>168</sup> Federal Court of Justice, judgment of 29 April 1970, Case IV ZR 97/69, Federal Court of Justice, judgment of 16 December 1982, Case IX ZR 90/81.

<sup>169</sup> Herr, Thomas, Ansprüche aus ehebezogener Zuwendung richtig geltend machen und abwehren, in: Familienrecht kompakt, Volume 5/2008, p. 82 et seqq.

<sup>170</sup> Federal Court of Justice loc.cit.

<sup>171</sup> This arrangement is usually recommended by tax advisors and financial planners to reduce contributions.

a result of the death of one of the marriage partners and, in particular, excludes this possibility in case of divorce.

Finally, in a surrender contract, the functioning marriage should be set out as the business foundation with the right to be able to request repayment at the earliest in case of divorce. This means that repayment depends in a subsidiary manner on the future repayment claim, in case of divorce.

In any case, Section 852 Code of Civil Procedure does not prevent actual execution in accordance with Sections 829, 835 Code of Civil Procedure by means of mandatory enforcement, but rather simply postpones the "transfer for collection" or realization<sup>172</sup>, as provided for in Section 852 I Code of Civil Procedure also in case of a claim to a legal portion<sup>173</sup>. This means that execution is possible even before the asserting of a claim by the creditor. However, it remains a highly personal decision on the part of the spouse as the creditor of the claim to reassignment, which was agreed upon in case of divorce, whether this claim should be asserted at all – which, however, does not initially prevent execution<sup>174</sup>.

Refraining later from claims as defined under Section 852 Code of Civil Procedure is (contrary to the wording of Section 129 II Insolvency Code) neither contestable nor does it lead to any obligation to pay compensation for damages on

---

<sup>172</sup> Federal Court of Justice, judgment of 08 July 1993, Case IX ZR 16/92, Federal Court of Justice of 06 May 1997, Case IX ZR 147/96.

<sup>173</sup> Federal Court of Justice, judgment of 26 February 2009, Case VII ZB 30/08.

<sup>174</sup> Higher Regional Court Munich, decision of 10 March 2010, Case 34 Wx 10/10.

the part of the creditor<sup>175</sup>. Asserting a claim is not an obligation within the insolvency proceedings, so the discharge of residual debt is not denied<sup>176</sup>.

Only in case of a need for maintenance does the case law allow for<sup>177</sup> assertion by the recipient of social welfare benefits against the will of the beneficiary. For this purpose, a transfer of the receivable to the State is required in accordance with social welfare law<sup>178</sup>. This underlines the principle of subsidiarity, i.e. the subordination of State benefits.

Case law has left open whether in the way of dual execution both the reassignment and the authority decide on assertion would then be subject to execution if the asset transfer were an allocation resulting from marriage in accordance with Section 852 II Code of Civil Procedure<sup>179</sup>. If a right to alter the legal relationship represents an asset for the party in question, which it can use to recover the assets (in)directly for itself or without the legal condition of a divorce, it would be subject to execution in case of doubt (dual execution).

The assignment of claims as defined Section 852 Code of Civil Procedure (legal portion, gain) before contractual recognition or *lis pendens* can be contested even in case of a lack of a disadvantage to creditors<sup>180</sup>.

---

<sup>175</sup> Federal Court of Justice, judgment of 06 May 1997, Case IX ZR 147/96.

<sup>176</sup> Federal Court of Justice, judgment of 25 June 2009, Case IX ZR 196/08

<sup>177</sup> Federal Court of Justice, judgment of 08 December 2004, Case IV ZR 223/03.

<sup>178</sup> Configuration option: it would be possible to grant the spouse a second right of abode, but on the suspensive condition of the removal of the higher priority party, so that it only comes into effect for the remainder of the life time of the spouse upon the death of the party, similarly to a bequest; there should also be a suspensive condition for the case of separation or divorce.

<sup>179</sup> Federal Court of Justice, judgment of 20 February 2003, Case IX ZR 102/02.

<sup>180</sup> Federal Court of Justice, judgment of 08 July 1993, Case IX ZR 116/92.

With regard to a gain as defined in Section 1378 III Civil Code, this claim will only begin with the ending of the matrimonial property, i.e. from *lis pendens* in accordance with Section 1384 Civil Code so that any prior assignment is void<sup>181</sup>, however, a cure in accordance with Section 141 Civil Code remains possible later<sup>182</sup>.

The previous owner only retains the option to perform an insolvency procedure domestically or in another EU country with discharge of residual debt because mandatory executions are not permitted during the insolvency proceedings, Section 89 Insolvency Code<sup>183</sup>. Material safeguarding of assets within the (future) insolvency assets from the last month before the insolvency assets will become effective when the proceedings are initiated, Section 88 I Insolvency Code<sup>184</sup>. Consumers have three months for this, Section 88 II Insolvency Code.

Otherwise, the rule applies domestically that material safeguards such as in particular liens (non legal, not contractual agreements, only sovereign execution) based on a mandatory enforcement from the time before the initiation of the insolvency proceedings provide entitlement to segregation and therefore also remain in force after the time of the discharge of residual debt, cf. Sections

---

<sup>181</sup> Federal Court of Justice, judgment of 08 May 2008, Case IX ZR 160/06.

<sup>182</sup> Federal Court of Justice, judgment of 21 April 2004, Case 170/01.

<sup>183</sup> Federal Finance Court judgment of 12 April 2005, Case VII R 7/03.

<sup>184</sup> For differentiation, Federal Court of Justice decision of 06 February 2014, Case IX ZB 57/12: "Insolvency creditors are the personal creditors who have a justified claim to assets against the debtor at the time of the initiation of the insolvency proceedings (Section 38 Insolvency Code). An insolvency receivable of this kind is in place in accordance with the case law of the Federal Court of Justice if the circumstances that are the basis of the claim is already complete before the initiation of the proceedings, even if a receivable on the part of the creditor is created only after the beginning of the insolvency proceedings. Only the legal basis for the claim must have existed before the initiation of the insolvency proceedings. It is

47, 51 (1, 301) II and III Insolvency Code<sup>185</sup>. Discharge of residual debt means that debts become imperfect obligations. Security obtained (e.g., through execution) or settlement only from the time before the insolvency application is incongruent and is therefore contestable, however<sup>186 187</sup>.

If, therefore, one or three months before an insolvency application, a creditor has a sovereign execution performed, it can pursue the individual mandatory enforcement after the conclusion of the insolvency proceedings.

The execution will no longer apply if the principal debt is paid. It will be cancelled if the gain is not asserted in court or contractually recognized, Section 852 Code of Civil Procedure, and the receivable will not exist or (after a divorce) will no longer exist<sup>188</sup>. The realization of the real estate property, which is unencumbered in this respect will only be considered after a divorce without the asserting of a claim for gains or after the waiving of the asserting of a claim by the entitled party in a marriage contract or a separation and divorce agreement. If the marriage ends as a result of death, the execution of the gain will be cancelled – however, the inheritance and/or (currently already the future<sup>189</sup>) legal portion will be subject to execution, Section 852 Code of Civil Procedure<sup>190</sup>.

---

irrelevant whether the receivable itself already existed or is due (Federal Court of Justice, decision of 22 September 2011 – IX ZB 121/11, margin note 3 with further references)".

<sup>185</sup> Allolio, Hanno, Das Insolvenzrecht in der Praxis des Familienrechtlers, in: Forum Familienrecht, 1/2001, 9 et seqq.

<sup>186</sup> Federal Court of Justice decision of 24 March 2011, Case IX ZB 217/08.

<sup>187</sup> Design option: By executing on-going income, the creditor secures further execution, even after the end of the good conduct phase, because the assignment of wages and pledging of waging in accordance with Section 114 Insolvency Code is only ineffective with a time limit (Federal Court of Justice, judgment of 24 March 2011, Case IX ZB 217/08). There is therefore no question of the cancellation of a pledge. For the debtor, on the other hand, there is an option, e.g., to submit the insolvency application before execution.

<sup>188</sup> Federal Court of Justice NJW 1988, 495.

<sup>189</sup> Brandenburg Higher Regional Court, decision of 23 September 1997, Case 10 W 44/97;

<sup>190</sup> Schünemann, Detlev, Pfändungsschutz, in: Vollstreckung effektiv 05/2001, p.69 et seq.

The decisive factor with regard to the question of whether the claim to settlement of a gain is included in the insolvency assets is whether this was incurred during the actual "insolvency procedure", i.e. at precisely that time and therefore would be subject to execution or part of the insolvency assets or whether this falls in the subsequent "period of good conduct", which is currently six years<sup>191</sup>. As a result of the fact that the gain is not subject to the catalogue of acquisition of assets in accordance with Section 295 I (2) Insolvency Code and remains at the free disposal of the insolvency debtor during the six-year "trustee period" (period of good conduct). Otherwise, it would only be in time before the initiation of insolvency proceedings in case of execution of the future claim to the gain.

#### 4.5.7 Transfer in Exchange for Settlement of the Previous Matrimonial Gain

If in case of liquidation of the matrimonial property between spouses the assets exchanged are mainly equal in value, for example as an agreement on the separation of property with settlement of the gain incurred until then against transfer of the real estate assets, this is not a disposal free of charge, so that the four-year contest options in accordance with Section 4 Contesting Act or Section 134 Insolvency Code are not applicable<sup>192</sup>. Contracts that change the mat-

---

<sup>191</sup> Nuemann, Thuid, Auswirkungen der Verbraucherinsolvenz eines Ehegatten auf den Zugewinnausgleich, in: Familienrecht kompakt, 06/2008, p. 100 et seq.

<sup>192</sup> Federal Court of Justice, judgment of 20 October 1971, Case VIII ZR 212/69.



rimonial property regime cannot be contested as a gift; at most they are material transfer processes<sup>193</sup>.

If these are unpaid contracts with close family members, there must be a direct disadvantage to creditors for the two-year contest period to take effect, Section 3 II Contesting Act, Section 133 II Insolvency Code in connection with Section 138 I Insolvency Code.

Monetary consideration however requires that the performance and compensation are of approximately equal value, so that the four-year period for gifts in accordance with Section 4 I Contesting Act, Section 134 Insolvency Code does not take effect. This is the case if the valuation date of the initial assets is set back to a time before the marriage in case of the settlement of the gain<sup>194</sup>. Restitution, however, in accordance with Section 143 II Insolvency Code only has to take place to the extent that the contractual partner is enriched by the lack of monetary consideration.

In accordance with Section 133 II Insolvency Code, Section 3 II Contesting Act an intention to disadvantage the (former<sup>195</sup>) creditors and the knowledge of the contractual partner is refutably assumed<sup>196</sup>. For example, this also affects a party's "own" family foundation, Section 138 II Insolvency Code.

The Federal Court of Justice already excludes the "extremely infrequent situation" of the settling the gains by means of changing the marital property regime during the marriage from a knowledge of an intention to create a disadvantage,

---

<sup>193</sup> BGHZ 57, 123; BGHZ 116, 178 in: NJW 1992, 558.

<sup>194</sup> Werner, Rüdiger, Die Güterstandsschaukel, in: StBW 2011, 715 et seqq.

<sup>195</sup> Federal Court of Justice, judgment of 01 July 2010, Case IX ZR 58/09.

<sup>196</sup> Federal Court of Justice, loc.cit.

which opens up the contest of payment of a fee. The marital property swing<sup>197</sup>, i.e. the immediate return to the legal matrimonial property after settlement of the gain to date, could also be dangerous as an indicator with regard to contesting. The evidence that the spouses assume to the best of their knowledge that all creditors will get their money and that therefore there was no known intention on the part of debtor to place the creditors at a disadvantage is to be documented in a timely manner as a representation of the asset situation and in the best case have this tested in accordance with a material inspection.

The same applies to the "family home swing" in which the wealthier spouse transfers the real estate property free of tax and years later a re-sale is performed, also tax-free between spouses. A marriage contract cannot be contested by future creditors because there is no claim to the maintenance of the marital property regime<sup>198</sup>.

If the other party was aware of the intention to cause a disadvantage, the ending of the community of accrued gains and its performance can be contested, Section 3 I Contesting Act, Section 133 I Insolvency Code. In accordance with Section 143 Insolvency Code, restitution can take place naturally, alternatively, a value replacement must take place as a claim under the law of obligations in accordance with Section 143 I 2 Insolvency Code. Counterclaims from previous securities are revived, however, Section 144 I Insolvency Code; cf. Sections

---

<sup>197</sup> In case of the "small" marital property swing, the spouses remain in the new marital property regime; in case of the "large" marital property swing, the spouses return to the original marital property regime.

273, 387 et seqq. Civil Code in connection with Section 96 I(1) Insolvency Code.

#### 4.5.8 Transfer in Exchange for a Rental or Lease Right

If the previous owner establishes a rental or lease right with the new owner and if the latter is a State institution (e.g., municipality), the insolvency capability of a new owner of this kind would be excluded initially. In case of a (further) sale, the purchaser would enter into rental or lease agreements, Sections 578 I, 566 I Civil Code.

If the purchaser is capable of insolvency however, rental or lease agreements would be subject to immediate termination in case of realization by the insolvency administrator or an auction at the instigation of creditors of the "new" owner, Section 57a Act on Forced Sale and Sequestration, Section 111 Insolvency Code<sup>199</sup>.

The tenants or lessees, however, have the option of also having themselves notarially granted a limited personal easement "within a rental/lease agreement (on the suspensive agreement of its existence) excluding the owner" for use of the property ("tenant's easement").

In case of enforcement against the landlord or its insolvency, the actual enforcement of the legal special termination right is withdrawn, in particular after

---

<sup>198</sup> Federal Court of Justice, judgment of 20 October 1971, Case VIII ZR 212/69, NJW 1972, 49 et seq.

<sup>199</sup> Design option: In addition to the rental or lease agreement, "security" by means of a limited personal (tenant) easement (e.g., right to basement, right of abode) should be con-

an auction. Often, the tenant/lessee wants to protect its investments on leasehold land and ground extensively, Section 111 Insolvency Code, Section 57a Act on Forced Sale and Sequestration<sup>200</sup>.

If the easement secures a transfer of use under the lease agreement, deletion from the land register can be requested as soon as the lease agreement ends<sup>201</sup>.

#### 4.5.9 Transfer in Exchange for a Life-time Right of Abode

The transfer of real estate to a spouse exposes this asset to access by its creditors. An economic devaluation with regard to the spouse creates the condition of a life-long highly personal right of abode, Section 1093 Civil Code. In principle, this "restricted personal easement" is not subject to execution<sup>202</sup> and is not part of the insolvency assets<sup>203</sup>.

The right of abode would only belong to the insolvency assets of the entitled party in accordance with Section 36 I 1 Insolvency Code or be subject to execution in accordance with Section 857 III Code of Civil Procedure if a transfer of exercise to third parties was permitted, Section 1092 I 2 Civil Code<sup>204</sup>, which

---

sidered. This is usual in case of larger investments by the industry on land and property owned by third parties.

<sup>200</sup> Böker, Hans-Gerd, Die Mietsicherungs- oder Mieterdienstbarkeit, Berlin 2008, p. 5 et seqq.

<sup>201</sup> Higher Regional Court Munich, judgment of 05 April 2000, Case 3 U 5502/99.

<sup>202</sup> Federal Court of Justice, judgment of 09 November 2006, Case IX ZR 170/06.

<sup>203</sup> Federal Court of Justice NJW 1962, 1932.

<sup>204</sup> Federal Court of Justice, judgment of 29 September 2006, Case V ZR 25/06.

requires as a condition a contractual<sup>205</sup> (i.e. bilateral) agreement<sup>206</sup> between the entitled party and the obliged party – until then the right of abode will remain an asset not affected by insolvency<sup>207</sup>. Only if the agreement of a transfer is performed in notarial form in accordance with Sections 873, 877 Civil Code and the entry in the land register is applied for and approved Section 29 German Land Registration Act, does the entry in the land register result in inclusion in the insolvency assets and being subject to execution<sup>208</sup>. Only the holder of the right of abode and the owner – not the creditor or insolvency administrator are entitled to make the entry because until the entry the right of abode is not subject to execution and is not part of the insolvency assets<sup>209</sup>.

It addition, it must be ensured that the right of abode is entered with first priority in the land register so that it will remain in place in case of an auction, Sections 52 I 1, 44 I Act on Forced Sale and Sequestration. If the right of abode is not secured with first priority in the land register and if there is an auction at the instigation of a creditor with higher priority, the right of abode will expire<sup>210</sup> in accordance with Sections 52 I 2, 91 I Act on Forced Sale and Sequestration, while

---

<sup>205</sup> LG Flensburg, judgment of 30 July 2007, Case 4 O 156/07.

<sup>206</sup> Federal Court of Justice, judgment of 19 January 2007, Case V ZR 163/06, FamRZ 2007, 632.

<sup>207</sup> Federal Court of Justice, judgment of 25 September 1963, Case VIII ZR 39/62.

<sup>208</sup> Sämisch, Henning, Das Wohnrecht des Schuldners als persönlich beschränkte Dienstbarkeit gem. §§ 1090 ff. BGB in der Insolvenz, in: ZInsO, Volume 17/2005, p. 922 et seqq., with additional references

<sup>209</sup> Configuration option: the transfer of the exercise of the right of abode can be excluded in the transfer agreement as a precaution. In addition a pre-emptive right would not be subject to execution, Section 473 Civil Code (cf. Federal Court of Justice, judgment of 20 March 2003, Case IX ZR 102/02), if it is arranged materially (Section 1094 II Civil Code) or subjectively personally (Section 1094 I Civil Code) – without transferability expressly entered in the land register (Sections 1098 I 1, 463 et seqq. Civil Code). It would not be a transfer of the exercise of the right if caregivers or life partners move into the residence. There is no right to inspection on the part of the new owner with regard to the party with the right of abode.

<sup>210</sup> Federal Court of Justice, judgment of 14 February 2003, Case V ZR 54/02.

a "retirement" (right) remains in place Section 9 Introductory Act to the Act on Forced Sale and Sequestration<sup>211</sup>, cf. Section 96 Introductory Act to the Civil Code. The giving up of a retirement or retirement cottage<sup>212</sup>, a claim to an annuity subject to execution can then be created, cf. Section 18-20 Implementing Law for the Bavarian Civil Code<sup>213</sup>. A retirement contract, however, can only be in place if the party's own economic livelihood is transferred<sup>214</sup>, i.e. not only a real estate property. Within, for example, a farm transfer agreement, however, a highly personal service can also be promised, which is then not subject to the insolvency application because it is not transferrable and is therefore not subject to execution, Sections 36 I 1 Insolvency Code, 851 I, 857 I, III Code of Civil Procedure, 613 II Civil Code<sup>215</sup>.

If the right of abode as a result of an auction at the instigation of a creditor entered with a higher priority in the land register, the party formerly entitled to a right of abode can request from the original purchaser in accordance with the case law from an independent guarantee promise<sup>216</sup> in particular compensation at the level of the usual rent, but will also bear the risk in case of insolvency of the original purchaser. The party previously entitled to a place of abode in accordance Section 92 II Act on Forced Sale and Sequestration is entitled to a settlement from any additional auction proceeds, the level of which is limited to

---

<sup>211</sup> FGPrax 1997, 256.

<sup>212</sup> The retirement cottage has been recognized for many years as an obligation to provide a benefit in kind (e.g., food, place of residence, care services) usually in exchange for farm transfer.

<sup>213</sup> Milzer, Lutz, Varianten von dinglichen Wohnrechten, in: BWNotZ 7/2005, 136 et seqq.

<sup>214</sup> Federal Court of Justice, judgment of 25 October 2001, Case V ZR 293/01.

<sup>215</sup> Federal Court of Justice, judgment of 21 February 2013, Case IX ZR 69/12.

<sup>216</sup> Federal Court of Justice, judgment of 14 February 2003, Case V ZR 54/02.

a maximum of 25 times the annual comparative rent, Section 121 Act on Forced Sale and Sequestration.

In principle, not exercising a right of abode does not automatically result in it being deleted<sup>217</sup>, rather only if this is legally or actually the case on a long-term basis. In case of a long-term stay in a home, a life annuity can be payable in the long term by way of interference with the basis for the transaction or supplementary interpretation of the contract or there may be a claim to authorization to transfer the exercise to a third party. A contractual prohibition on the assignment of claims of this kind would not be able to prevent execution by creditors<sup>218 219</sup>.

If, however, the right of abode can in fact no longer be exercised but there is also no question of a sale or rental, a supervisor as the legal representative may readily waive the right of abode because then this is no longer an asset, and therefore it is also not a gift<sup>220</sup>, Section 1804 Civil Code. Then after a surprising "spontaneous recovery" of health, there would be no way for the formerly entitled party to get back into their residence, so a deviating contractual provision would have to be created.

An obligation on the part of the owner to rent the residence or to allow the rental of the residence, when the party finally moves out of the property into a nursing

---

<sup>217</sup> Federal Court of Justice, judgment of 19 January 2007, Case V ZR 163/06; dissenting Federal Court of Justice, judgment of 07 December 1984, Case V ZR 189/83.

<sup>218</sup> Federal Court of Justice, judgment of 28 March 2007, Case VII ZB 43/06.

<sup>219</sup> Configuration option: if moving out of the property on a long-term basis, e.g., into a nursing home, in order to avoid a claim to payment (subject to execution), the resting or deletion of the right of abode can be agreed so that it is foreseeable that nothing (more) would be available for a transition to social welfare office.

home is regularly not assumed by the Federal Court of Justice to be a hypothetical intention of the party<sup>221</sup>, so that there is probably no attachability in the transfer contract in the absence of any other provision.

#### **4.6 Transfer of Assets as Maintenance**

In case of transfers of assets as allocations as a result of marriage, only a residential owner-occupied property located in the EEA or EU remains free of inheritance or gift tax, Section 13 I (4a) Inheritance and Gift Tax Act. This privilege is irrespective of the marital property regime and the value of the real estate and can be used repeatedly. In addition, the personal gift tax allowances will be available again every 10 years (for spouses, currently EUR 500,000). Even the (repeated) lifetime settlement of the gains between spouses on the occasion of a change in the marital property regimes remains tax free, Section 5 II Inheritance and Gift Tax Act.

In case of life partnerships, there is no legal obligation to pay maintenance. In cases such as these, allocations for training and for appropriate maintenance will remain tax free, Section 3 I (12) Inheritance and Gift Tax Act. With regard to the maintenance payments, these expenses can also be deducted as "extraordinary encumbrances", Section 33 a I Income Tax Act<sup>222</sup>.

---

<sup>220</sup> Federal Court of Justice, decision of 25 January 2012, Case XII ZB 479/11.

<sup>221</sup> Federal Court of Justice, judgment of 09 January 2009, Case V ZR 168/07.

<sup>222</sup> Federal Finance Court judgment of 29 May 2008, in: Federal Tax Gazette 2009 II p. 363.



Legal maintenance obligations exist in particular between direct relations in accordance with Sections 1601, 1602 Civil Code, and between spouses in accordance with Sections 1360, 1361, 1569 et seqq. Civil Code. In these cases, the payments are not taxable<sup>223</sup>. The maintenance obligation and appropriateness of the level is based on the income and asset situation, and includes personal needs, household expenses, and also the financing of a retirement pension. This opens up legally tax-free on-going asset transfers – in case of a retirement pension also the purchasing of life insurance with the partner with the assumption of (one-time) premium payments.

With regard to the question of the contestability of maintenance payments, the decisive factor is that a marriage with a legal maintenance obligation regularly does not represent a legal transaction in order to pose a disadvantage to creditors, although the 10-year contesting of wilfully disadvantageous transactions is excluded, Section 3 I Contesting Act, Section 133 I Insolvency Code. As a result of the fact that the maintenance relates in particular to a legal obligation for the spouses, the possibility of withdrawal is excluded so that there is no question of a four-year contest. In addition, in case of marriage and resulting legal maintenance obligation, there is no underlying paid contract with related persons, which opens up a two-year contest period, Section 3 II Contesting Act, Section 133 II Insolvency Code. Even in case of simple fulfilment of liabilities this would be the case.

---

<sup>223</sup> Götz, Hellmut, Unbenannte Zuwendung – Steuerfreier Vermögenszuwachs unter Ehegatten, in: Familienrecht kompakt, 03/2004, p. 46 et seqq.

#### 4.6.1 Asset Protection without Spouses or Third Parties

The owner can also create an easement for itself (initially). This is recognized in the case of the party itself creating a usufruct<sup>224</sup> because an exclusion of the possibility of the existence of material rights is not known to the law so that an owner easement is permitted, Section 1030 Civil Code. Even for the limited personal easement, in particular a right of abode, this is recognized<sup>225</sup>. This arrangement is also an option if it is still unclear to whom and under what particular circumstances which rights are granted (for example, a subordinated right of abode and/or/or usufruct) or to whom ownership should be transferred later for example by means of anticipated inheritance.

Contrary to the wording of the law, Section 3 Contesting Act and Section 133 Insolvency Code are applied including for the case of a material right in favour of the owner itself<sup>226</sup>, as the Federal Finance Court intends<sup>227</sup>. With regard to citizens' liabilities with regard to contributions and taxes, the case law privileges the State by means of an expansion of the subsidiarity principles *contra legem*.

On the other hand, in the view of the Federal Court of Justice, the owner and future debtor is not a suitable addressee of an allowance, Section 143 Insol-

---

<sup>224</sup> Federal Court of Justice, judgment of 14 July 2011, Case V ZB 271/10.

<sup>225</sup> Federal Court of Justice, judgment of 11 March 1964, Case V ZR 78/62.

<sup>226</sup> Side note: In Switzerland, the right of abode is also non-transferrable, non-inheritable and not subject to execution, Section 776 et seqq. Swiss Civil Code. It can only be created for a life time by contract (e.g., sale with reservation) or unilaterally by means of the bequeathing of a right of abode. The (Paulian) challenge is based on Sections 286, 288 Swiss Debt Collection and Bankruptcy Act, although particularly between spouses despite equal values of performance and compensation in case of a sale, "due attention" is expected because assets subject to execution are partially converted into assets not subject to execution and therefore withdrawn from the creditor; cf. BGE 130 III 235 et seqq.

<sup>227</sup> Federal Finance Court judgment of 30 March 2010, Case VII R 22/09.

olvency Code<sup>228</sup>. With regard to non-government creditors, the owner easement is insolvency-proof.

In Switzerland, conversion of assets subject to execution and not subject to execution of the Paulian (gift) contest, in particular if a real estate purchaser creates a right of abode in favour of the seller as compensation, Section 286 Swiss Debt Collection and Bankruptcy Act<sup>229</sup>.

#### 4.6.2 Asset Security of Family Pool, Family GmbH, Foundation or Trust

Private asset administering family companies are also referred to as family pools. The bringing of assets into a company of this kind makes it possible that in case of appropriately drafted articles of association, some creditors at most be able to execute a settlement claim that would have to focus on half of the fair value in order not to be arranged unethically<sup>230</sup>. In this process, a company under civil law can also be entered as the owner in the land register without the land registry office having to check the identity and the representation relationships between the shareholders at the time of entry<sup>231</sup>. If another (still) registered Civil Code shareholder becomes insolvent, however, a corresponding note may be entered in the land register<sup>232</sup>.

---

<sup>228</sup> Federal Court of Justice, decision of 13 October 2011, Case IX ZR 80/11.

<sup>229</sup> BGE 130 III 235, judgment of 05 February 2004, Case 5C.176/2003.

<sup>230</sup> Federal Court of Justice, judgment of 09 January 1989, Case II ZR 83/88; Federal Court of Justice, judgment of 16 December 1991, Case II ZR 58/91; Federal Court of Justice, judgment of 13 June 1994, Case II ZR 38/93.

<sup>231</sup> Federal Court of Justice, decision of 28 April 2011, Case V ZB 194/10.

<sup>232</sup> Higher Regional Court Dresden, decision of 15 October 2011, Case 17 W 0828/11.

It is sometimes recommended that a Civil Code company should not be created in notarial form in order to disguise the shareholder situation, if applicable in connection with a trust as well as a pretended "transfer for security" of the shares in the companies or assets of the partnership under civil law to a third party<sup>233</sup>, Section 117 Civil Code. Document services<sup>234</sup> on a partnership under civil law are also hardly practically possible because the place of the actual administration is often difficult to determine in case of pure asset management activities without an obligation to register with the Trade Licensing Office – even for a place of jurisdiction in accordance with Section 17 I Code of Civil Procedure<sup>235</sup>. In addition, since 2001, it is no longer necessary to make a complaint against all shareholders with a joint application because the partnership under civil law is legally responsible<sup>236</sup>.

The contribution of the items to be protected against creditors to a family pool can be subject to a contest in accordance with Section 3 Contesting Act, Section 133 Insolvency Code<sup>237</sup>. The voting rights can be distributed differently in the Articles of Association from relevant level of participation in the share capital. For example (also) in the case of a withdrawal as a shareholder in accordance with the Articles of Association voting rights commitments can be agreed

---

<sup>233</sup> Rademacher, Wolfgang, Vermögens-Sicherung durch GbR-Vertrag, p. 42 et seqq.

<sup>234</sup> Case example: Notary N. of Chemnitz certifies the relocation of headquarters of a GmbH to Frankfurt am Main to the new address "PO Box 247 274". In response to a later enquiry, he stated that he knew Frankfurt to be a modern city and thought "PO Box" was an actual street, although since then no creditors have been able to deliver to the P.O. Box.

<sup>235</sup> Kühnlein, Andreas, BGB-Gesellschaft rechts- und parteifähig – Durchbruch oder Seifenblase, p.3, in: <http://www.beate-heilmann.de/BGBGesellschaft.pdf>

<sup>236</sup> Federal Ministry of Finance correspondence of 06 January 2014 (ref. IV C 2 - S 2701/10/10002); Federal Court of Justice 29 January 2001, Case II ZR 331/00.

upon. A partition by compulsory auction as is usual in case of a disputed inheritance settlement can be excluded by means of the Articles of Association for the Civil Code company, in which the shareholders withdraw automatically from the company under certain legal conditions. In the case of divorce also, withdrawal as a shareholder can be anticipated in exchange for a settlement.

An alternative to a family company would be to place the assets in a trust or foundation. The latter can be legally responsible or organized as a trust foundation. The placing of assets in a legal person without an owner is subject to paid deposit of the four-year contest, Section 4 I Contesting Act, Section 134 I Insolvency Code. Constructions of this kind are considered, however, in case of medium-sized and larger assets because the formation costs are usually more than 2% of the assets and the annual administration costs are up to more than 1% of the assets. For creditors, the question will then arise based on the Articles of Association and any "by-laws" of what legal claims can be asserted or executed against the managing board of the foundation or the trustee as a representative of this legal person in individual cases. Section 138 II Insolvency Code is also to be adhered to in this respect.

If the foundation is headquartered in a foreign country<sup>238</sup>, this makes access by creditors more difficult particularly if there is no enforcement agreement in existence between the States – however, it also exposes the founder to the poten-

---

<sup>237</sup> Federal Finance Court loc.cit.

<sup>238</sup> cf. Oertzen, Christian / Ponath, Gerrit, Asset Protection im deutschen Recht, p. 88 et seqq.

tial high risk of the misappropriation or embezzlement of its assets by the business management to the foundation or the trustee<sup>239</sup>.

It would be an unsuitable attempt, for example, accepting tax cuts, to employ a foreign legal entity<sup>240</sup> for estate planning<sup>241</sup> or asset security<sup>242</sup>, or for example to simulate the official sale of assets to the party's own trustee. Disposals of this kind would be ineffective as fictitious transactions as defined under Section 117 Civil Code or as a result of a breach of public policy<sup>243</sup>, and would therefore not be able to protect assets or to ensure that assets are allocated to persons outside of the estate.

#### 4.6.3 Recourse to Social Welfare Authorities

As already shown, different benchmarks apply to relations with the State, for example as a result of tax debts, from those that apply to private persons. Social welfare benefits follow the principle of subsidiarity, Sections 2 I, 90 I Social

<sup>239</sup> Configuration option: The New York Convention (Convention on the Recognition and Enforcement of Foreign Arbitral Awards, NYC) makes it possible to enforce decisions by boards of arbitration in several countries.

<sup>240</sup> Configuration option: It should be noted that traditional "non-EU camouflage constructions" (for example "Belize Ltd.", "Panama S.A."), which have bearer shares) with the administrative headquarters switched domestically to a partnership under civil law ("pre-incorporated company") that does not have to be entered in the commercial register, because in this country, the headquarters theory applies (e.g., also France, Portugal, Spain, Liechtenstein, Austria). If, on the contrary, a country follows the formation theory (e.g., USA, Switzerland, UK, Sweden), a foreign company will not lose its legal capacity by moving its administrative headquarters to another country. It is possible that a treaty between the States positively regulates recognition in case of relocation of headquarters. cf. Federal Court of Justice, judgment of 29 January 2001, Case II ZR 331/00. Only in case of European companies are the headquarters of a company (including for the Insolvency Code proceedings) decisive, even if the company is exclusively active in Germany, European Court of Justice, judgment of 02 May 2006, Case C-341/02.

<sup>241</sup> Typically, foreign banks and insurance companies apply, but also trustees and foundation providers, so that the legal portion, as well as claims to maintenance, legal pension rights adjustments and settlements of gains can be avoided.

<sup>242</sup> Düsseldorf Higher Regional Court, judgment of 30 April 2010, Case I-22 U 126/06, Stuttgart Higher Regional Court judgment of 29 June 2009, Case 5 U 40/09.

<sup>243</sup> This refers to public order or underlying values in Germany.

Code XII. For example, the rejection of an inheritance that is of value is judged to be unethical<sup>244</sup>, but not the waiving of the legal portion by a disabled person<sup>245</sup>. The social welfare authorities can transfer the claim to the legal portion to themselves contrary to Section 852 I Code of Civil Procedure (including the claim to settlement of gains if maintenances is needed) without any pledging being required, Sections 93 I 1 and 4 Social Code XII.

In case of the transfer of real estate property with reservation of the right of abode it must be ensured that a life estate as defined under Art. 96 Introductory Act to the Civil Code can be converted into a monetary pension when moving into a nursing home. The deciding factors are relocation clauses, according to which maintenance and care are only due as long as the person with the right of abode lives in the actual property. Relying on compensation upon departure is not contrary to public policy<sup>246</sup>. The possibility of transferring the residence to a third party after departure would not have to be contractually excluded if applicable, if no claim subject to execution were to be created.

If the donor becomes impoverished, the social welfare authorities can transfer the claim to return to themselves for at least 10 years in accordance with Section 528 Civil Code. Generally, return of the property is not required, but rather compensation for the value<sup>247</sup> for the urgent needs or a life annuity<sup>248</sup>. The donee cannot refer to the fact that the real estate property would have been a

---

<sup>244</sup> Higher Regional Court Hamm, decision of 16 July 2009, Case I-15 Wx 85/09.

<sup>245</sup> Federal Court of Justice, judgment of 19 January 2011, Case IV ZR 7/10.

<sup>246</sup> Federal Court of Justice, judgment of 06 February 2009, Case V ZR 130/08.

<sup>247</sup> Federal Court of Justice, NJW 1985, 2419.

"protected asset" of held by the donor as defined under Social Code XII<sup>249</sup>, so the social welfare authorities should not have had access to it. The donee can only protect itself against this by reserving the right of return to the donor or a completely avoiding non-remuneration. This would require only a contractual provision and expert valuation of the performance and compensation.

---

<sup>248</sup> cf. on the obligation to support children BVerfGE, judgment of 07 June 2005, Case 1 BvR 1508/96.

<sup>249</sup> Federal Administrative Court, NJW 1992, 3312.



## 5 DISCUSSION

### 5.1 Welfare Economics

From the point of view of welfare economics, the issue is increasing the welfare of society as a whole, although the normative evaluation of redistribution effects between the state, companies (including creditors and debtors), as well as private households is affected. This also affects the balance (with regard to time) between the generations (grandparents – parents – children). If one determines with regard to insolvency and mandatory enforcement that "the debts of one person are the assets of another person", this is a zero-sum situation.

Politicians have determined the minimum base income of pensioners by means of the "basic provision pension". A rule-of-thumb<sup>250</sup> states that the monthly income of needy pensioners should be brought up to around EUR 758. Then, however, it also suggests that the policy should increase the opportunities to build up a private capital-covered retirement pension accordingly. This applies above all to the part of the population for which no sufficient statutory pension can be expected.

---

<sup>250</sup> [http://www.deutsche-rentenversicherung.de/Allgemein/de/Inhalt/2\\_Rente\\_Reha/01\\_rente/04\\_in\\_der\\_rente/04\\_grundsicherung\\_bei\\_kleinstrenten/00\\_01\\_grundsicherung\\_anspruch\\_und\\_hoehe.html](http://www.deutsche-rentenversicherung.de/Allgemein/de/Inhalt/2_Rente_Reha/01_rente/04_in_der_rente/04_grundsicherung_bei_kleinstrenten/00_01_grundsicherung_anspruch_und_hoehe.html)

This would help to relieve the state further, strengthen the subsidiarity principle, and also save the state administration costs. In addition, the investment of the capital in life insurance from Switzerland and Liechtenstein would then be of interest for even fewer members of the population, which would strengthen domestic financial intermediaries.

## **5.2 *Homo Economicus***

The "Homo economicus" model for conduct relates to individual benefit (individual benefit theory) and striving for the highest level of benefit (rationality theory) in the selection of the various options for configuration or actions. The question of options or alternatives affects all citizens and provides the opportunity for financial consultants and intermediaries accordingly.

### **5.2.1 Security through Statutory Mandatory Contributions to Pension Funds or Schemes**

There is currently no obligation for everyone to be insured within a system of state pension insurance. In the German Pension Insurance (pay-as-you-go system), primarily employees and certain freelance employees (e.g., midwives) are obliged to be insured, as well as craftsmen.

Some freelancers have to pay appropriate mandatory contributions into a professional pension scheme (defined-contribution scheme). In both groups,

around 20% of the gross income is to be paid, although this relates only to a monthly income of less than EUR 6,000 (contribution ceiling).

Both the pay-as-you-go system and also the defined-contribution procedure offer many opportunities to set up voluntary contributions or additional contributions even without an obligation to obtain insurance. In 2010, almost 270,000 contributors were voluntarily insured in the German Pension Insurance, paying an average of at least EUR 100 per month in contributions<sup>251</sup>. This process privileges mandatory members of the pension funds (e.g., notaries, doctors, lawyers, architects, tax advisors) because they can also voluntarily pay into the German Pension Insurance up to the highest amount. They therefore, for example, have the option to distribute risk in the system both by pay-as-you-go funding (German Pension Insurance) and also build up a pension claim in the system by means of defined contributions (pension scheme).

The regular protection against access by insolvency administrators and creditors in the pay-in phase underlines the attractiveness of these two state pension systems with a pay-in obligation for affected parties.

## 5.2.2 Security through German Life Insurance

Private pension insurance policies in which a value of up to EUR 256,000 can be saved with protection from execution taking into account the legal require-

---

<sup>251</sup> Appendix 2; Source: DRV statistics.

ments of Section 851c Code of Civil Procedure – staggered by age – are outstanding from an economic point of view.

Since the expenses in the savings phase are up to 100% tax deductible during the savings phase they can be compared with life gross income for the purposes of simplification.

<u>Educational status</u>	<u>Average life earnings (gross)</u>
Degree	EUR 2.32 million
Technical college	EUR 2.00 million
High school graduation	EUR 1.56 million
Professional training	EUR 1.33 million
No professional training	EUR 1.08 million

Table 3: Educational status and average life earnings<sup>252</sup>

Presuming that affected persons work an average of 40 years and are retired for 20 years and excluding the effects of interest and inflation, then one must save 1/3 of one's income for 40 years in order to maintain the same average level during the period of retirement.

It therefore becomes clear that the capital protected from execution in Germany in accordance with Section 851c Code of Civil Procedure during the savings phase alone is not generally sufficient under any circumstances to secure the pension level during retirement.

Section 851c Code of Civil Procedure can, however, enable a capital-covered supplementary pension in addition to a main pension from the German Pension Insurance and/or a pension scheme. Those paying into the German Pension Insurance or the pension scheme save around 20% in pension contributions (capped by the contribution ceiling) too little, in order to be able to expect approximately the same level of pension in retirement after leaving professional life.

The introduction of Section 851c Code of Civil Procedure in 2007 and the case law that applied until then shows inversely that the legislators expect freelance employees to obtain their own voluntary insurance from the German Pension Insurance if they are not obliged to pay into any system of pension insurance. The persons in question, however, have to date hardly been informed of this fact by the ministries and chambers of industry and commerce (membership of these is obligatory for all independent tradespeople).

From this, politicians could extend the applicability of Section 851c Code of Civil Procedure for example by including, in addition to the life insurance in the form of pension insurance, pay-out plans for savings or investment assets.

An increase in the protected assets in accordance with Section 851c Code of Civil Procedure would also make occupational retirement pensions more attractive.

In addition, the legal concept of "hardship" as defined in Section 765a Code of Civil Procedure could be integrated in such a way that, without an application by

---

<sup>252</sup> <http://doku.iab.de/kurzber/2014/kb0114.pdf>

the debtor – an appropriate overall amount of assets for a retirement pension could be left free of any mandatory enforcement or access by the insolvency administrator. This could be staggered based on age but also taking into account other pensions, health, or any future inability to work. From an economic point of view, this would avoid creditors accessing assets today, which would actually result in the state paying social welfare benefits.

### 5.2.3 Security through Life Insurance Policies from Switzerland and Liechtenstein

The desired level of an accumulation of assets through a life insurance policy in Liechtenstein or Switzerland goes far beyond the options available in Germany. In Liechtenstein, insurance savers can also appoint life partners as beneficiaries. In practice, the effective choice of law and therefore the asset protection can, however, often prevent customer contracts from coming into existence with the involvement of an intermediary or broker.

The decisive factor is the knowledge that the protection of the assets in life insurance policies is not taking place arbitrarily, but only in favour of family or a life partner, i.e. the group of beneficiaries is not arbitrary. Only under such circumstances have legislators in Switzerland and Liechtenstein determined that the interests of creditors are of lower priority.

Courts in Germany fail to recognize models of this kind in Germany only if "public order" is affected, for example, if tax evasion is involved, or if the intention is

to circumvent as mandatory regulations of family or inheritance law (maintenance, gains, right to legal portion). The management of financial houses in Switzerland and Liechtenstein has been able to pick up on this because legality is always ensured and distribution is organized without traditional intermediaries.

#### 5.2.4 Securing of the Family Home

An owner-occupied residential property can save a private household from paying rent. More than 50% of net income can be taken up by rent and subsidiary costs. Legal arrangements for the real estate property can be made in such a way that the creditors and the insolvency administrator have (almost) no possibility of gaining access to it.

From an economic point of view, residential real estate is more important than life insurance that is exempt from execution because there is no limit of up to EUR 256,000, Section 851c Code of Civil Procedure.

Initially the encumbering of the real estate with a right of abode, a usufruct, or a pre-emptive right of sale should be considered in order to make enforcement significantly less attractive for creditors to enter rights of this kind for themselves. This can be done initially without transferring ownership to a third party, if, for example, the decision on an anticipated succession has not yet been made.

Implementation of measures of this kind that takes place too late exposes the participants to contest by creditors and/or insolvency administrators with a time limit<sup>253</sup>.

In case of transfer of ownership, it would be damaging for protection of the party's own assets if it agreed upon the reservation of the right to be able request the return of ownership of the property at any time.

If the transfer of ownership is made to a partner who is not a spouse, a second right of abode can be created for the actual spouse/partner on a subordinated basis or on a suspensive condition depending on the time of the elimination of the higher-priority right of abode held by the previous owner itself, or for spouses as joint and several creditors. This can be done on the suspensive conditions of divorce<sup>254</sup>.

### 5.2.5 Asset Protection through Internal Family Contracts and Companies

Above all, wealthy and/or high-income spouses can strategically spread assets for a retirement pension between maintenance payments to the other spouse, to children, or life partners. As long as the level of is not inappropriate, this will not be considered a gift.

---

<sup>253</sup> Kürthy, P./ Rossberg, P., So brachte Pleite-Schlecker seine Millionen beiseite, in: Bild-Zeitung of 27 June 2012, p.1.

<sup>254</sup> In case of a risk of a company split, a right of abode can be attractive for tax purposes.



Gifts can in turn be avoided by obtaining a promise of a proportionate compensation. The level and duration of the compensation, for example can be arranged by means of promising a life annuity. If the aim of asset protection is avoided, for contracts between family members, only a lead time of two years would have to be adhered to, Section 138 Insolvency Code. In case of gifts, this period would be four years, Section 4 Contesting Act, Section 134 Insolvency Code.

The use of family companies, trusts and foundations for the management of assets, taking into account the costs<sup>255</sup> (including for monitoring and financial control), as well as possible compensatory advantages apply only to larger asset amounts in excess of EUR 1 million.

### 5.2.6 Security through Timely Private Insolvency

Only in case of gains and claims to legal portions does the special situation that the execution proves ineffective if the relevant legal claim is never asserted. In the best case, hardly any effective execution is performed here before the insolvency procedure and a gain is incurred only during good conduct phase because it is then retained by the debtor in full.

---

<sup>255</sup> Configuration option: like a family foundation, a provident fund could also be considered for asset protection (legal forms here would be foundation, gGmbH, or e.V.). It is possible to assign assets to this for endowment. A founder can be a board member, although Section 138 Insolvency Code is to be adhered to. The promise of services could be made in case of emergency and without a legal claim, which also does not have to be an occupational pension scheme benefit. Pledging of the reinsurance would be possible, but it would then also be subject to execution.

Each mandatory material enforcement (e.g., execution) would regularly "survive" the discharge of residual debt, Sections 301 et seqq. Insolvency Code. The insolvency procedure only includes enforcements one month before the insolvency application; in case of consumer insolvency, three months before the insolvency application, Section 88 Insolvency Code. This means that the requirement for a timely insolvency application applies to the debtor.

For this purpose, 15 countries in Europe offer a national insolvency procedure. The shorter the procedure, the more quickly the affected party will have its current and/or future on-going proportional income available again in full, i.e. without a limitation of the amount that is exempt from execution.

## 6 CONCLUSION

### ***6.1 Hypothesis of a subsistence level protected against insolvency through life insurance***

The hypothesis that in case of a retirement pension at subsistence level, the risk of loss is minimal proves to be only partially accurate in the case of life insurance.

The basic social security provision is used as a basis for the subsistence level. In accordance with a rule of thumb for state pension, this subsistence level totals an average of EUR 758.00 per month.

The pay-in phase and the pay-out phase have different asset protection.

In the pay-in phase, assets can be collected from German life insurance companies with exemption from execution, which can finance a pension of up to around EUR 500.00 – i.e. below the subsistence level.

In the pay-out phase, ongoing payments from pension insurance are exempt from execution in accordance with the provisions on protection from execution with up to more than EUR 1,050.

### ***6.2 Political implementation of pay-as-you-go process***

For decades, the level of provision of the statutory pension has been falling, i.e. retirement pensions with the generation model of the pay-as-you-go process.

On the other hand, the private capital-covered retirement pension is promoted over life insurance through taxes.

German legislators have so far failed to protect the assets formed through life insurance for retirement at a sufficiently high level from loss in case of insolvency or mandatory enforcement. Private and occupational pensions are affected.

This may result from the fact that creditors' receivables are constitutionally protected as property, however, the welfare state also has an economic interest in keeping the making up of retirement pension with social benefits through basic income support as low as possible.

### ***6.3 Exemption of life insurance from execution – Comparison with Switzerland and Liechtenstein***

The assets in private life insurance policies are protected in case of insolvency and mandatory enforcement at most insofar as to be able to finance a retirement pension of up to around EUR 500, Section 851c Code of Civil Procedure. This is less than an average basic pension, and therefore no secured income at the level of the existence minimum.

In addition, protection in case of insolvency and execution is only considered in case of the minimal additional provisions under the Riester pensions, insofar as

these were already promoted by state supplements, § 851d Code of Civil Procedure. Pensions of this kind can reach up to around EUR 50.00.

Further asset protection, for example to avoid (future) social benefits, is, however, possible by means of an application to the enforcement court, Section 765a Code of Civil Procedure. The prospects for this are low because debt reduction at the expense of the state is often approved. It is therefore necessary for politicians to extend exemption from execution for capital investments to retirement pensions, for example in order to promote the welfare of the state.

In an unlimited amount, however, with a focus on family welfare, assets can be collected in life insurance policies from Switzerland and Liechtenstein in a manner that is exempt from execution.

#### ***6.4 Protection against execution in case of statutory mandatory insurance***

As a result of the general complete protection of the money paid in during the savings phase, contributions to statutory pension insurance, as well as to professional pension schemes, are privileged. This relates to freelancers without any mandatory obligation to obtain insurance, for whom the German Pension Insurance at least provides the opportunity to make voluntary payments.

Some self-employed people have mandatory insurance through pension funds (e.g., doctors, architects, tax advisors), and some through the German pension insurance (e.g., tradespeople, midwives, artists). Other self-employed people can obtain voluntary insurance (upon request) through the German pension insurance. Mandatory members of pension schemes have this option available as a privilege with virtually double protection.

### ***6.5 Optimization decision of homo economicus***

Homo economicus can improve his standard of living during and after insolvency by creating a right of abode that is exempt from execution. Alternatively, for example, private pensions can be considered and situations where they are subject to execution can be avoided by means of contractual arrangements.

Since assets in German life insurance schemes do not offer sufficient protection against enforcement for the formation of assets to provide minimum subsistence during retirement, there is a virtual obligation to obtain a pension by also making payments to the German pension insurance association of a sufficient amount (often on a voluntary basis). In order to save on continuing rent expenses during retirement in addition or as an alternative, a right of abode comes under consideration.

From the point of view of homo economicus, questions are also asked in advance with regard to optimization by means of distribution of risk. With regard to content, this involves, among other things, a risk assessment, for example:

- of the political risk to the development of statutory pension increases, and
- of the risk of a change in capital market interest and of the real interest rate (life insurance), as well as
- market price development in case of real estate assets.

### ***6.6 Strategic conduct of homo economicus in the event of an impending execution***

During the pay-out phase (e.g., drawing of the pension), for single persons, up to more than EUR 1,000 per month are exempt from execution. A higher level of retirement pension would only be available if insolvency proceedings were performed. The usual duration of proceedings in Germany is up to more than 7 years but can be decrease to less than two years in other countries, particularly where the place of residence is moved to France or the United Kingdom.

If there is a risk of mandatory enforcement, a prompt enforcement insolvency procedure is favourable because prior executions (for example, even of pensions due in the future) – despite later discharge of residual debt – regularly provide entitlement to further use of the pledged property.

## 7 REFERENCES

- [1] Allolio, Hanno, Das Insolvenzrecht in der Praxis des Familienrechtlers, in: Forum Familienrecht, 1/2001, 9 et seqq., ISSN 1433-8696
- [2] Bach, Stefan, Vermögensabgaben – ein Beitrag zur Sanierung der Staatsfinanzen in Europa, in: DIW Wochenbericht No. 28/2012 of 11 July 2012, p. 3 et seqq.,  
[http://www.diw.de/sixcms/detail.php?id=diw\\_01.c.405712.de](http://www.diw.de/sixcms/detail.php?id=diw_01.c.405712.de) [quot. 22 August 2014]
- [3] Basedow, Jürgen, Das neue Internationale Versicherungsvertragsrecht, in: NJW 1991, p. 785 et seqq., 791, 792, ISSN 0341-1915
- [4] Blaschczok, Christine, Die schweizerisch-deutschen Staatsverträge auf dem Gebiet des Insolvenzrechts, in: ZIP 02/83, p. 141 et seqq., ISSN 0723-9416
- [5] Blitz, Jan, Sonderinsolvenzverfahren im Internationalen Insolvenzrecht, ISBN 978-3899497182
- [6] BMWI, Pfändungsschutz! – Sicherheit für die Altersvorsorge von Selbstständigen, Unternehmerinnen und Unternehmern, 2008, p. 2,  
[http://www.wisa-unternehmensberatung.de/tl\\_files/wisa-unternehmensberatung/images/Download-Dateien/pfaendungsschutz.pdf](http://www.wisa-unternehmensberatung.de/tl_files/wisa-unternehmensberatung/images/Download-Dateien/pfaendungsschutz.pdf) [quot. 22 August 2014]
- [7] Böker, Hans-Gerd, Die Mietsicherungs- oder Mieterdienstbarkeit, Berlin 2008, ISBN 978-3-89949-557-7
- [8] Bosbach, Gerd, Demographische Entwicklung – kein Anlass zur Dramatik, [http://www.nachdenkseiten.de/upload/pdf/gbosbach\\_demogr.pdf](http://www.nachdenkseiten.de/upload/pdf/gbosbach_demogr.pdf) [quot. 22 August 2014]
- [9] Bosbach, Gerd, Die instrumentalisierte Zukunftsangst: Gesetzliche oder private Rentenversicherung, wer hat den Nutzen?, in: [http://www.tele-akademie.de/begleit/video\\_ta120401.php](http://www.tele-akademie.de/begleit/video_ta120401.php) [quot. 22 August 2014]
- [10] Brennecke, Harald / Otépková, Eva, Insolvenz und Restschuldbefreiung in Europa – Ein Vergleich der Insolvenzordnungen der Länder der EU, Karlsruhe 2009, ISBN 978-3-939384-05-2
- [11] Bretz, Michael, Insolvenzen in Europa – Jahr 2011/12, p. 6 et seqq.,  
[http://www.creditreform.com/fileadmin/user\\_upload/Insolvenzen\\_in\\_Europa\\_Jahr\\_201112.pdf](http://www.creditreform.com/fileadmin/user_upload/Insolvenzen_in_Europa_Jahr_201112.pdf) [quot. 22 August 2014]
- [12] DACH, Europäische Anwaltsvereinigung e.V., DACH, Europäische Anwaltsvereinigung e.V., p. 1 et seqq., <http://www.dach-ra.de/> [quot. 22 August 2014]
- [13] Deutsches Institut für Altersvorsorge, Die Reformen seit 2001 senken das Rentenniveau, in: [http://www.boeckler.de/pdf/p\\_imk\\_report\\_73\\_2012.pdf](http://www.boeckler.de/pdf/p_imk_report_73_2012.pdf)
- [14] Diehl, Jörg, Steuerhinterziehung: Verraten und verkauft mit der Credit Suisse, Der SPIEGEL /, 18 July 2012, in:  
<http://www.spiegel.de/wirtschaft/service/steuerhinterziehung-mit-lebensversicherungen-bei-der-credit-suisse-a-845070.html> [quot. 22 August 2014]



- [15] Euler Hermes Kreditversicherungs-AG, Antrag häufig zu spät gestellt, in: *Wirtschaft Konkret* no. 414, p. 8 et seqq., <http://www.wirtschaft-konkret.de/de/dokumente/414-ursachen-von-insolvenzen.pdf/414-ursachen-von-insolvenzen.pdf> [quot. 22 August 2014]
- [16] Feld, Lars, Verschuldung in Deutschland und der EU als Problem der Generationengerechtigkeit, in: [http://www.tele-akademie.de/begleit/video\\_ta120415.php](http://www.tele-akademie.de/begleit/video_ta120415.php) [quot. 22 August 2014]
- [17] Fiala, Johannes, Die Insolvenzrisiken der Altersversorgung legal beherrschen, in: *V&S* 03/2012, p. 14 et seqq., ISSN 1437-0441
- [18] Fiala, Johannes / Lohkamp, Rüdiger, Probleme bei der Gestaltung einer "insolvenz-sicheren" Pensionszusage an einen mehrheitsbeteiligten Gesellschafter-Geschäftsführer – Eine Kritik des Modells der verpfändeten Rückdeckungsversicherung, in: *VersR* 2006, p. 331 et seqq., ISSN 0342-2429
- [19] Fiala, Johannes / Schramm, Peter, BGH-Urteil stellt Insolvenz-sicherheit der Zusatzversorgung infrage, in: *V&S* 07/2012, p. 34 et seq., ISSN 1437-0441
- [20] Frick, Joachim / Rimle, Alois, Vermögensschutz mittels schweizer Lebensversicherung, in: *Der Schweizer Treuhänder* 12/03, p. 1007 et seqq., [http://iframe.treuhaender.ch/GetAttachment.axd?attaName=1039a03\\_1097.pdf](http://iframe.treuhaender.ch/GetAttachment.axd?attaName=1039a03_1097.pdf) [quot. 22 August 2014]
- [21] Fuchs, Thomas, Geldwäsche, Verjährung und Bewertungseinheit, wie passt das zusammen?, Mannheim 2004, <http://delegibus.com/2004,9.pdf> [quot. 22 August 2014]
- [22] Ganßmann, Heiner, Der Großvater, sein Enkel und die Rentenreform, in: <http://userpage.fu-berlin.de/~ganssman/texte/Der%20Gro%DFvater.pdf> [quot. 22 August 2014]
- [23] Gössler, Jörg, Die liechtensteinische Lebensversicherung: Zivil- und steuerrechtliche Aspekte aus deutscher Sicht, in: *Liechtenstein-Journal* 01/2010, p. 3 et seqq., [http://li-journal.li/assets/files/Beitraege/012010\\_01.pdf](http://li-journal.li/assets/files/Beitraege/012010_01.pdf) [quot. 22 August 2014]
- [24] Götz, Hellmut, Unbenannte Zuwendung – Steuerfreier Vermögenszuwachs unter Ehegatten, in: *Familienrecht kompakt*, 03/2004, p. 46 et seqq., ISSN 1617-8173
- [25] Grziwotz, Herbert, Die Zwickmühle – Gläubiger oder Ehegatte?, in: *Legal Tribune* of 24 May 2012, <http://www.lto.de/recht/hintergruende/h/privatvermoegen-in-der-insolvenz-die-zwickmuehle-glaebiger-oder-ehegatte/> [quot. 22 August 2014]
- [26] Haarmeyer, Hans, Starke Gläubiger im Insolvenzverfahren?!, in: [http://www.kommunalkassenverwalter.de/files/vortrag\\_-\\_der\\_einfluss\\_der\\_glaebiger\\_im\\_insolvenzverfahren\\_pruefungs-und\\_einflussmoeglichkeiten\\_.pdf](http://www.kommunalkassenverwalter.de/files/vortrag_-_der_einfluss_der_glaebiger_im_insolvenzverfahren_pruefungs-und_einflussmoeglichkeiten_.pdf) [quot. 22 August 2014]
- [27] Hanesch, Walter, Die Entwicklung der Grundsicherung im Alter im Zeitraum 2008-2020, in: <http://vdk.de/cms/mime/2917D1314171814.pdf> [quot. 22 August 2014]
- [28] Hellwich, Günther, Pfändungsschutz zur Alterssicherung Selbständiger, in: *JurBüro*, Volume 6/2007, p. 289, 295 et seqq., ISSN 0931-6000

- [29] Herr, Thomas, Ansprüche aus ehebezogener Zuwendung richtig geltend machen und abwehren, in: Familienrecht kompakt, Volume 5/2008, p. 82 et seqq., <http://www.sgh-kassel.de/FK-05-2008-82-84.pdf> [quot. 22 August 2014]
- [30] Kern, Dietmar, Das neue Insolvenzverfahren für Privatpersonen und Unternehmer, Herrenberg 2009
- [31] Korinek, Stephan, Kann für inländische Versicherungsnehmer das Konkursprivileg für Ehegatten oder Nachkommen nach dem schweizerischen Versicherungsvertragsgesetz gelten?, in: Die Versicherungsrundschau 5/2000, p. 64 et seqq., ISSN 2076-3239
- [32] Kranzusch, Peter, Ökonomische Resultate von Unternehmensinsolvenzverfahren, p.11, in: [http://www.insoforum.de/dateien/kranzusch\\_02\\_11\\_2009.pdf](http://www.insoforum.de/dateien/kranzusch_02_11_2009.pdf) [quot. 22 August 2014]
- [33] Kreft, Gerhard, Neue Entwicklungen im Anfechtungsrecht, in: DStR 2005, 1192 et seqq., ISSN 0012-1347
- [34] Kreiß, Christian, Studium Generale über die aktuelle Wirtschaftskrise und Eurokrise, in: <http://www.youtube.com/watch?v=7CPW7zzpsfg> [quot. 22 August 2014]
- [35] Krüger, Thomas, Die grenzüberschreitende Verfolgung insolvenzrechtlicher Ansprüche durch eine deutsche Insolvenzmasse in der Schweiz, p. 3, 6, in [http://www.becker-krueger.de/blog/wp-content/uploads/2009/02/die\\_grenzueberschreitende\\_verfolgung\\_insolvenzspezifischer\\_ansprueche\\_in\\_der\\_schweiz.pdf](http://www.becker-krueger.de/blog/wp-content/uploads/2009/02/die_grenzueberschreitende_verfolgung_insolvenzspezifischer_ansprueche_in_der_schweiz.pdf) [quot. 22 August 2014]
- [36] Kühnlein, Andreas, BGB-Gesellschaft rechts- und parteifähig – Durchbruch oder Seifenblase, p.3., in: <http://www.executio.de/hk/BGBGesellschaft.pdf> [quot. 22 August 2014]
- [37] Kürthy, P./ Rossberg, P., So brachte Pleite-Schlecker seine Millionen beiseite, in: Bild-Zeitung, 27 June 2012, p.1, <http://www.bild.de/geld/wirtschaft/schlecker/so-brachte-pleite-schlecker-seine-millionen-beiseite-24866188.bild.html> [quot. 22 August 2014]
- [38] Lennert, Philipp / Ponath, Gerrit, Die liechtensteinische Stiftung: Ein Gestaltungsinstrument zur Asset Protection für deutsche Privatpersonen, in Private, Geld-Spezial, 2009, p. 32 et seqq., ISSN 1424-6651
- [39] Meili, Friedrich, Moderne Staatsverträge über das internationale Konkursrecht, Zurich 1907, <http://babel.hathitrust.org/cgi/pt?id=umn.31951002642029x;view=1up;seq=10> [quot. 22 August 2014]
- [40] Milzer, Lutz, Varianten von dinglichen Wohnrechten, in: BWNotZ 7/2005, 136 et seqq., ISSN 1434-2979
- [41] Müller, Albrecht, Die Reformlüge, Munich 2004, ISBN 9783426273449
- [42] Nuemann, Thurid, Auswirkungen der Verbraucherinsolvenz eines Ehegatten auf den Zugewinnausgleich, in: Familienrecht kompakt, 06/2008, p. 100 et seqq., <http://www.iww.de/fk/archiv/zugewinnausgleich-auswirkungen-der-verbraucherinsolvenz-eines-ehegatten-auf-den-zugewinnausgleich-f13735> [quot. 22 August 2014]

- [43] Oehler, Andreas, Altersvorsorge in Deutschland: Mängel mit System?, in: [http://www.uni-bam-berg.de/fileadmin/uni/fakultaeten/sowi\\_lehrstuehle/finanzwirtschaft/Transfer/Altersvorsorge\\_Maengel\\_im\\_System.pdf](http://www.uni-bam-berg.de/fileadmin/uni/fakultaeten/sowi_lehrstuehle/finanzwirtschaft/Transfer/Altersvorsorge_Maengel_im_System.pdf) [quot. 22 August 2014]
- [44] Oertzen, Christian / Ponath, Gerrit, Asset Protection im deutschen Recht, Herne 2013, ISBN 9783935079693
- [45] Pühn Rechtsanwälte, Client Circular 07/2011, p. 1, [http://www.puehn.de/infob/i\\_puehn\\_jul\\_11.pdf](http://www.puehn.de/infob/i_puehn_jul_11.pdf) [quot. 22 August 2014]
- [46] Rademacher, Wolfgang, Vermögens-Sicherung durch GbR-Vertrag, Selm 2010, ASIN: B002I4DWVU
- [47] Roth, Daniela D., Versicherungsansprüche im Konkurs, in: Insolvenz- & Wirtschaftsrecht 03/1998, p. 107 et seqq., <http://www.transliq.ch/files/IWIR-3-98-107.pdf> [quot. 22 August 2014]
- [48] Ruch, Sabine, Sozialversicherungssysteme im Vergleich, p.10, <http://www.sassonia.de/ifkvpdf/sozialsysteme.pdf> [quot. 22 August 2014]
- [49] Sämisch, Henning, Das Wohnrecht des Schuldners als persönlich beschränkte Dienstbarkeit gem. §§ 1090 ff. BGB in der Insolvenz, in: ZInsO, Volume 17/2005, p. 922 et seqq., ISSN 1615-8032
- [50] Schünemann, Detlev, Pfändungsschutz, in: Vollstreckung effektiv 05/2001, p.69 et seq., ISSN 1439-5355
- [51] Solverman, Rachel Emma, A Fortress for Your Money, in: The Wall Street Journal, 15/16 July 2005, p. B1, ISSN 0099-9660
- [52] Spahlinger, Andreas, Sekundäre Insolvenzverfahren bei grenzüberschreitenden Insolvenzen, Tübingen 1998, ISBN 3161470370
- [53] Thieme, Matthias, Das Kartell der Geheimniskrämer, in: Capital 10/2012, p.132 et seqq., ISSN 0008-5847
- [54] Werner, Rüdiger, Die Güterstandsschaukel, in: StBW 2011, 715 et seqq., ISSN 1610-4064
- [55] Wimmer, Klaus, Das Gesetz zum Pfändungsschutz der Altersvorsorge unter besonderer Berücksichtigung der Hinterbliebenenversorgung, in: ZinsO, Volume 6/2007, p. 281 et seqq., ISSN 1615-8032
- [56] Wüthrich, Karl, Kann eine ausländische Konkursmasse in der Schweiz eine Klage gegen einen ihrer Schuldner mit Sitz oder Wohnsitz in der Schweiz einleiten?, in: <http://www.wenger-platt-ner.ch/files/downloads/files/9f889ab402f1fdcc03bd728804e92be2/WuK-Auslaendische%20Konkursmasse%20in%20der%20Schweiz.pdf> [quot. 22 August 2014]
- [57] Zimmermann, Dieter, Der neue Pfändungsschutz bei der Altersvorsorge, Darmstadt 2008, [http://www.infodienst-schuldnerberatung.de/fileadmin/user\\_upload/Rubriken/Praxisthema/2008/Altersvorsorge-Pfaendungsschutz-b-angen.pdf](http://www.infodienst-schuldnerberatung.de/fileadmin/user_upload/Rubriken/Praxisthema/2008/Altersvorsorge-Pfaendungsschutz-b-angen.pdf) [quot. 22 August 2014]

## 8 APPENDICES

### Insured

#### Self-employed and tradesmen under compulsory insurance in the reporting year

Year	Self-employed				Tradesmen	
	by law		upon application		Male	Female
	Male	Female	Male	Female		
<b>Former West German states</b>						
1981	3,031	2,731	41,720	7,128	71,757	12,347
1982	3,068	2,783	40,154	7,059	66,677	12,642
1983	3,168	2,728	38,297	6,897	64,843	12,939
1984	3,283	2,817	36,214	6,839	61,780	12,993
1985	3,460	3,000	33,370	6,585	58,674	12,749
1986	3,759	3,307	31,135	6,397	55,995	12,766
1987	4,439	4,174	33,010	8,044	54,186	12,819
1988	5,082	4,732	31,571	8,180	52,976	12,853
1989	5,107	4,787	29,212	7,910	52,526	12,952
1990	5,278	4,979	28,200	7,640	53,294	13,006
1991	9,240	7,414	25,330	6,301	53,846	13,099
1992	10,734	8,264	24,272	6,800	55,317	12,943
1993	10,721	8,516	23,897	6,108	57,833	13,307
1994	10,485	8,539	23,426	5,979	61,297	13,557
1995	9,621	8,536	22,213	5,598	59,955	12,998
1996	9,352	7,854	22,117	5,381	67,742	14,064
1997	8,844	7,537	20,872	4,892	69,354	13,999
1998	8,573	7,558	18,634	4,181	70,545	14,045
1999	8,970	8,155	17,504	3,843	70,691	14,405
2000	9,021	8,479	14,681	3,195	68,429	14,266
2001	8,683	8,574	14,181	3,055	64,818	13,919
2002	8,805	9,136	12,880	2,798	60,152	13,567
2003	9,682	9,902	10,609	2,372	55,056	12,627
2004	10,688	12,418	10,945	2,386	50,199	11,021
2005	11,588	13,187	10,066	2,252	46,403	10,041
2006	11,557	13,825	9,235	2,149	43,623	9,331
2007	11,499	14,080	8,562	2,072	42,866	9,447
2008	11,402	14,760	8,102	2,072	41,979	9,708
2009	11,983	19,699	7,688	2,079	40,606	9,781
2010	12,494	22,650	7,467	2,098	40,121	9,775

Former East German states						
1992	8,347	5,099	7,020	3,987	19,694	2,584
1993	9,251	6,095	6,546	3,629	15,200	2,252
1994	12,248	7,430	3,978	2,142	15,213	2,545
1995	7,182	5,862	2,066	1,284	15,674	2,868
1996	6,678	5,304	2,144	1,290	14,894	2,809
1997	6,116	4,862	2,212	1,138	14,869	2,900
1998	5,686	4,569	2,078	1,091	15,466	3,128
1999	5,683	4,455	1,928	1,056	15,831	3,324
2000	5,338	4,119	1,717	951	15,239	3,250
2001	4,879	3,818	1,582	895	14,528	3,250
2002	4,592	3,729	1,455	788	13,695	3,115
2003	4,424	3,535	1,099	631	13,040	2,977
2004	4,781	4,362	1,333	680	12,097	2,598
2005	4,787	4,495	1,258	629	10,965	2,310
2006	4,467	4,434	1,138	593	9,599	2,005
2007	4,183	4,320	1,132	624	9,634	2,113
2008	4,000	4,199	1,187	676	9,856	2,248
2009	4,083	5,655	1,247	760	9,907	2,324
2010	4,122	6,248	1,309	774	9,856	2,373
Germany						
1992	19,081	13,363	31,292	10,787	75,011	15,527
1993	19,972	14,611	30,443	9,737	73,033	15,559
1994	22,733	15,969	27,404	8,121	76,510	16,102
1995	16,803	14,398	24,279	6,882	75,629	15,866
1996	16,030	13,158	24,261	6,671	82,636	16,873
1997	14,960	12,399	23,084	6,030	84,223	16,899
1998	14,259	12,127	20,712	5,272	86,011	17,173
1999	14,653	12,610	19,432	4,899	86,522	17,729
2000	14,359	12,598	16,398	4,146	83,668	17,516
2001	13,562	12,392	15,763	3,950	79,346	17,169
2002	13,397	12,865	14,335	3,586	73,847	16,682
2003	14,106	13,437	11,708	3,003	68,096	15,604
2004	15,469	16,780	12,278	3,066	62,296	13,619
2005	16,375	17,682	11,324	2,881	57,368	12,351
2006	16,024	18,259	10,373	2,742	53,222	11,336
2007	15,682	18,400	9,694	2,696	52,500	11,560
2008	15,402	18,959	9,289	2,748	51,835	11,956
2009	16,066	25,354	8,935	2,839	50,513	12,105
2010	16,616	28,898	8,776	2,872	49,977	12,148

Source: Statistical Office of the German Pension Insurance Association - Insured, different age groups;  
until 1991 Statistics on direct contribution payment according to Pension Insurance Contribution Payment Ordinance,  
different age groups

Table 4: Insured under compulsory insurance

## Insured

### Insured on a voluntary basis in the reporting year

Year	Total		average contribution in EUR		of which paid a			
					minimum contribution		max. contribution	
	Male	Female	Male	Female	Male	Female	Male	Female
<b>Former West German states</b>								
1981	340,951	243,924	x	x	42,186	100,303	24,936	2,237
1982	363,338	247,750	x	x	43,446	92,418	22,852	1,945
1983	344,282	226,913	x	x	39,714	78,432	19,633	2,850
1984	517,228	269,270	x	x	165,014	111,432	16,744	1,382
1985	555,496	274,444	x	x	229,931	130,414	14,173	1,108
1986	553,094	271,137	x	x	252,500	131,780	12,235	961
1987	585,441	288,499	x	x	286,885	145,269	12,130	1,021
1988	586,208	282,980	x	x	308,165	146,903	11,081	921
1989	583,230	274,580	x	x	330,361	149,500	10,228	825
1990	585,758	257,925	x	x	353,204	149,447	9,900	842
1991	609,730	267,889	x	x	384,991	164,879	13,741	1,468
1992	612,704	268,073	97.26	66.94	406,598	188,528	15,026	1,748
1993	606,513	263,670	97.06	68.45	425,113	197,849	13,732	1,606
1994	603,655	251,825	102.03	75.36	461,035	205,879	11,332	1,343
1995	575,205	247,930	98.90	74.12	444,822	204,331	10,144	1,226
1996	593,899	236,755	97.23	75.99	466,691	194,944	8,235	935
1997	579,260	220,659	97.23	79.77	486,956	194,618	6,419	755
1998	554,898	203,227	95.05	80.49	473,357	179,882	5,410	662
<b>Former East German states</b>								
1992	46,819	26,231	27.09	27.18	45,458	25,449	0	0
1993	66,948	36,267	35.01	34.86	64,776	35,095	0	0
1994	88,412	43,317	43.10	42.84	84,682	41,703	0	0
1995	90,227	42,784	44.39	44.35	87,416	41,599	0	0
1996	99,211	42,755	48.53	48.51	96,603	41,592	0	0
1997	99,075	41,510	53.30	53.26	98,957	41,450	0	0
1998	94,965	38,421	53.40	53.34	94,889	38,373	1	0

Germany								
1992	659,523	294,304	92.28	63.39	452,056	213,977	15,026	1,748
1993	673,461	299,937	90.89	64.39	489,889	232,944	13,732	1,606
1994	692,067	295,142	94.50	70.59	545,717	247,582	11,332	1,343
1995	665,432	290,714	91.51	69.74	532,238	245,930	10,144	1,226
1996	693,110	279,510	90.26	71.79	563,294	236,536	8,235	935
1997	678,335	262,169	90.81	75.57	585,913	236,068	6,419	755
1998	649,863	241,648	88.97	76.18	568,246	218,255	5,411	662
1999	605,099	219,193	86.79	76.38	527,974	194,949	4,414	553
2000	559,427	197,447	82.54	74.07	493,396	176,411	3,768	467
2001	513,885	182,056	80.41	72.29	455,350	162,755	3,262	415
2002	473,290	168,442	79.78	72.51	424,056	152,724	2,720	357
2003	437,828	155,181	90.39	83.63	404,414	145,795	2,095	295
2004	402,636	142,403	93.04	86.80	372,822	133,908	1,767	257
2005	371,631	130,038	93.42	87.67	343,315	121,863	1,532	220
2006	347,268	121,818	94.53	89.59	320,151	113,409	1,269	203
2007	324,900	113,518	97.80	93.30	300,018	105,238	1,308	205
2008	305,634	107,984	99.53	96.49	281,467	99,381	1,284	228
2009	287,339	103,140	101.70	99.55	263,821	94,355	1,289	239
2010	269,092	95,579	102.55	101.06	246,682	87,001	1,312	274

As of 1999, due to discontinuation of the East qualification preservation contribution only shown for Germany in total on Euro conversion see Glossary

Source: Statistical Office of the German Pension Insurance Association - Insured, different age groups;

until 1991 Statistics on direct contribution payment according to Pension Insurance Contribution Payment Ordinance, different age groups

Table 5: Insured on a voluntary basis