



The World Jurist

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Privatization, Banking and Cross-Border Insolvency

Warsaw 2015 Conference Report



Prof. Dr. iur. Alexander J. Bělohávek, WJA President (Center), Prof. zw. dr hab. Paweł Czarnecki, Rector of Warsaw Management University (standing), during the conference opening (©Rob Quarles 2015)

The World Jurist Association's conference on **Privatization, Banking and Cross-Border Insolvency** was held from March 24-27, 2015 in Warsaw, Poland. The Warsaw 2015 conference was held in collaboration with Warsaw Management University, College of Management and Technical Sciences and was attended by delegates from four continents.

Wednesday, March 25, 2015 - Conference Opening

The conference was commenced by **Prof. dr hab. Paweł Stanisław Czarnecki (Poland)**, Rector of Warsaw Management University, who welcomed the participants and expressed his hope that the conference would be successful and the participants would enjoy their stay in Warsaw. Thereafter, the President of the World Jurist Association (WJA), **Prof. Dr. iur. Alexander J. Bělohávek (Czech Republic)** gave his opening speech and emphasized the role of Poland with respect to legal education and training of legal practitioners as well as its rich cultural and scholarly tradition. Prof. Bělohávek expressed his appreciation for the hospitality of the Warsaw Management University as one of the leading institutions in the Polish education system. Further, while summarizing the history of the WJA, Prof. Bělohávek also expressed his deep grief over the passing of WJA's Past President, **Mr. Ronald (Ron) M. Greenberg (USA)**, early this year. A moment of silence was observed for Ron's commemoration.

WSM's President **Prof. dr Stanisław Dawidziuk, Dr h.c. (Poland)** and WSM's Rector, **Prof. zw. dr hab. Paweł Stanisław Czarnecki (Poland)**, both stressed the importance of international academic cooperation and expressed their gratitude for having the opportunity to host the conference at Warsaw Management University. Both **Prof. Czarnecki** and **Prof. Dawidziuk** agreed that given the importance of the WJA's objectives and role at the international level, the holding of the conference represents a milestone in the history of the university.



Prof. Dr. iur. Alexander J. Bělohávek, WJA President (Center) receives title of Professor of Honorificum (©Rob Quarles 2015)

Prof. dr. hab. Paweł Stanisław Czarnecki (Poland) then conducted a memorable ceremony, the conferment of a title of **Professor of Honorificum** to WJA President, **Prof. Dr. iur. Alexander J. Bělohávek**, emphasizing that the title is given only to *outstanding personalities who have greatly contributed to the academic activities of Warsaw Management University*. Prof. Bělohávek expressed his

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gratitude and honor to receive the honorable title from such a widely recognized academic institution as the Warsaw Management University.

Also present at the opening ceremony was **Hon. Pierre Clive Agius (Malta)**, Ambassador of the Republic of Malta to Poland, who presented his views on the topics tackled at the conference. Ambassador Agius spoke of privatization as the only way to ensure efficiency and economic growth while ensuring that state does not interfere with the free market. He added that particular attention should be given to social responsibilities during privatization processes, and emphasized on the role of a banking system representing an indispensable element of a responsible government.

After the Ambassador's remarks on the conference topics, **Andrzej Słotwiński (Poland)**, representing the Polish Former President **Lech Wałęsa (Poland)**, read out a letter written by Lech Wałęsa addressed to the WJA President Prof. Dr. Alexander J. Bělohávek, congratulating him for the accomplishments of the World Jurist Association and presenting its support to fulfilling its purpose.

Finally, **Prof. nadzw. dr hab. Adam Szpaderski (Poland)**, Dean of the College of Management and Technical Sciences, Warsaw Management University, thanked the participants for their attention and declared the conference as officially open.

Panel Session I – Legal Framework for Privatization

Moderator: Prof. Dr. iur. Alexander J. Bělohávek (Czech Republic)

President of the World Jurist Association, and Managing Partner at Law offices of Bělohávek, Prague

Prof. Dr. iur. Karel Klíma (Czech Republic), Professor and Head of Department at the Metropolitan University in Prague and President for WJA's World Association of Law Professors (WALP), dedicated the introduction of his speech to the summary of the WJA's objectives, asserting that the major purpose of the WJA is to share experience of legal scholars and practitioners from various countries, both with respect to private and public law, thus contributing to comparative law worldwide. In his contribution titled *Limitation of the Public Functions in Relation To Private Area*, Prof. Klíma posed a number of interesting questions, such as which state interventions in property rights can be deemed legitimate? In this respect, Prof. Klíma discussed the *Rechtsstaat doctrine*, which is recognized in many European countries. The *Rechtsstaat doctrine* relates to setting the limits of state power with respect to individuals and their property rights. Here, Prof. Klíma also referred to the 1789 French Declaration of the Rights of Man and of the Citizen, which already laid down conditions for expropriation. In this vein, Prof. Klíma addressed the notion of public interest which may justify certain interventions, such as state crisis or national defense. Furthermore, he elaborated on the differences between civil law and common law jurisdictions as regards the limits of state power as well as the relation between the terms "privatization", "restitution" and "expropriation" and the role these instruments played in the history of post-communist countries. Prof. Klíma concluded by reiterating that it is not only the law-makers, but also those who apply the law who may affect the manner states intervene in property rights of the individuals, thus encouraging the judges present as delegates at the conference to approach the issue responsibly. During the subsequent discussion, the debate turned to the differences between the common law and civil law jurisdictions, in particular the role of case-law therein.

Dr. iur. Julita Zawadzka (Poland), Attorney-at-law at one of the leading Polish law firms (located in Krakow and Warsaw) Kubas Kos Gałkowski, presented on *Questionable Property of Privatized*

Enterprises in Poland: Disputes on Perpetual Usufruct Right. In her discussion, Dr. Zawadzka dealt with a variety of topics, including resources of privatization, the problems arising out of industrial privatization in Poland, the development of the privatization and re-privatization legislation, the features of the perpetual usufruct right and the effect of the privatization modes in terms of acquiring the right to property, and the practice of Polish courts compensating original property rights holders. She also elaborated on the potential link between the Polish privatization legislation and the protection under some bilateral investment treaties (BITs) binding upon Poland. In particular, Dr. Zawadzka posed a question as to whether the loss of the perpetual usufruct right by a former state-owned company, the shares of which were purchased by a foreign investor, may qualify as expropriation under the BITs. The speaker opined that such loss might amount to indirect expropriation. Noting that expropriation may be lawful under certain conditions, she argued that Poland might have violated some BITs nevertheless as the Polish authorities failed to provide sufficient guarantees for the investors' right to obtain compensation for expropriation. The subsequent discussion concerned a number of issues, such as exclusive jurisdiction of the European Union to enter into BITs, the international relations between the US and Poland, as well as the difference between the perpetual usufruct right and ownership. Here, the speaker noted that the holder of the perpetual usufruct right is obliged to pay annual fees, which makes it different from ownership. Still, she admitted that there have been proposals to transfer the right to ownership but that there is no political will for such legislation. Finally, the delegates discussed the distinctions between long-term ownership and other rights to hold property and the way this issue is dealt with in various jurisdictions, such as the US.



Conference delegates (left and right above) (@Rob Quarles 2015)

Panel Session II – The Impact of Privatization on Capital Markets and Successful Privatization Efforts

Moderator: **Prof. Dr. iur. Alexander J. Bělohlávek (Czech Republic)**
 President of the World Jurist Association, and Managing Partner at Law offices of Bělohlávek, Prague

Dr. iur. Bohuslav Halfar (Czech Republic), Department of Law, Faculty of Economics, VŠB – Technical University of Ostrava, and **Mgr. iur. František Halfar (Czech Republic)**, Attorney-at-law, Law offices of Bělohlávek, Prague, Czech Republic, spoke about *Economic Transformation and its Impact on Economic Crimes in the Czech Republic*. Firstly, they described the development of the property rights protection in the history of Czechoslovakia and subsequently the Czech Republic, with particular emphasis on the transition from a planned economy of the communist Czechoslovakia to a free market economy of the democratic Czechoslovakia, i.e. the process of voucher privatization. After specifying the peculiarities of the privatization process, they turned to the topic of economic crimes, again

drawing the line between the notion of economic criminality before and after the collapse of the communist regime. Finally, they presented their view that privatization has a significant impact on the growth of economic criminality. Furthermore, the co-authors embarked on the assessment as to whether criminal law itself represents an appropriate tool for eliminating economic criminality by fighting the causes thereof. Stressing the supplementary role of criminal law (*ultima ratio* principle), the co-presenters concluded that economic criminality should be fought against also by instruments of other areas of law, such as commercial or administrative law. Thus, criminalizing conduct that should be enforced rather by commercial or administrative law mechanisms and instruments is not the way to go.

In the second half of the panel, **Mr. Victor Kononchuk (Ukraine-Poland)** from the Warsaw Management University, College of Management and Technical Sciences, Management Scientific Club, presented his paper on *Privatization in Terms of Business Uncertainty and Political Instability – The Case of Ukraine*. In his presentation, Mr. Kononchuk dealt with a variety of issues related mostly to the difficulties encountered in the process of finding political and business stability in Ukraine. For instance, designating corruption as one of the major problems commonly arising out of privatization process as well as any other transition process in a particular country, Mr. Kononchuk analyzed the measures which may serve for the elimination thereof. He further analyzed the possible methods of privatization processes, pinpointing their pros and cons. In the author's view, the most appropriate method is the systemic approach consisting of a large number of small, but careful steps eventually leading to a safe and fair privatization process free from corruption and other forms of criminality. The subsequent debate embarked on a number of topics including the separation of powers within democratic states and the protection of public property by the judiciary. A few of the Nigerian delegates shared their experience and spoke of, inter alia, the independence of the judiciary from the executive.

Thursday, 26 March 2015

Panel Session III – Developments in International Banking Laws (Including Electronic Banking Issues)

Moderator: Ms. Kim G. Quarles (USA)

Second Vice President, World Jurist Association, & Senior Vice President at Willis of New York

Mr. Kamil Zawicki (Poland), Attorney-at-law, Kubas Kos Gałkowski & The Allerhand Institute, presented his paper titled *Currency Options and the Almighty Swiss Franc – Monsters or Myths of the Banking Sector?* Mr. Zawicki began by engaging the audience in a discussion on whether any of the delegates have experienced problems with loans in foreign currency in their country (ies). During this panel session, one of the delegates from the Philippines shared her experience. Then, Mr. Zawicki described the development of bank loans provision in Swiss Franc in Poland, pointing out the changes in the exchange rate and its effect on the bank loans in Poland. Particular emphasis was laid on the events of January 15, 2015, when the Swiss National Bank allowed the Swiss Franc to float, thus making the loans less affordable and driving the debtors of the loans in Swiss Franc into default. The subsequent situation in Poland involved some of the debtors redress against the banks before the court. Mr. Zawicki also referred to similar problems which occurred in Hungary with regard to foreign currency loans. Thereafter, he posed a number of questions provoking a lengthy discussion on the topics. The debate related to the suitability of a class-action mechanism allowing the debtors to go to

the court together, the potential applicability of consumer protection or the *rebus sic stantibus* principle and the possibility to seek redress from the financial advisors. Mr. Zawicki presented his view that the *rebus sic stantibus* principle is not applicable in this case as the fluctuations on the exchange rate cannot be considered an extraordinary change in the contractual relationship.

In the second half of the panel, **Dr. iur. Feliksas Petrauskas (Lithuania)**, General Director of the State Consumer Rights Protection Authority of the Republic of Lithuania, presented on *Legal Practice of the Lithuanian Consumer Rights Protection System in Banking and Financial Service Business*. In his presentation, he introduced the state consumer rights protection in the area of financial services together with the institutional system thereof in Lithuania. To allow the audience to relate to the topic and provoke discussion, Dr. Petrauskas raised a number of questions. For instance, the debate arose as to whether and to which extent may the activities of the National Banks, i.e. systematic supervision of the bank sector and capital sufficiency ensure effective and independent resolution of consumer disputes. The discussion then turned back to consumer protection with respect to bank loans. The delegates from Nigerian emphasized the freedom of will in a free-market economy and the application of the terms and conditions of the contract. Mr. Zawicki (Poland) countered by drawing the line between B2B and B2C contracts and arguing that the lack of knowledge, experience and economic standing of the consumers justifies their protection in B2C contracts.



Panel Session (©Rob Quarles 2015)



Conference Delegates (©Rob Quarles 2015)

Panel Session IV – Strategic Leadership and Privatization

Moderator: **Prof. nadzw. dr hab. Adam Szpaderski (Poland)**
Dean, College of Management and Technical Sciences, Warsaw Management University

Dr. Marek Gruchelski, Ph.D. (Poland), Warsaw Management University, College of Management and Technical Sciences, Department of Economics and Finance, presented on *Strategic Leadership Challenge – China Versus USA*. In his presentation, he focused on describing China's geostrategic activities and economic standing. In his view, China benefits from the systematically reduced duty rates, thus protecting its internal market and export through the policy of undercutting yuan rate. While emphasizing the economic and military advantage China has over the US, Dr. Gruchelski opined that the Republic of China's economic activities resemble a long term economic war.

Doc. Dr. Lech Smolaga, Ph.D. (Poland), Warsaw Management University, College of Management and Technical Sciences, Department of Economics and Finance, presented on *Strategic Leadership and*

Economic Challenges of Automation Age – Constructing New Theory and Practical Systems Approach. Dr. Smolaga presented his view that the modern economic theories cannot provide a solution for the current economic problems, such as insolvency crisis, financial crisis or the crisis of overproduction. Furthermore, he talked about and thoroughly described the causes of economic crises, such as financial illusion, money fetish or the distribution of national income. Then he went on to say that the challenge of the 21st century is the problem of automation, arguing that automation and technological unemployment gives rise to social exclusion. Thus, he concluded his presentation by stressing the need for a new world financial order, the main features of which should be more effective to control the financial system and labor market ensuring equitable distribution of national income.

Ms. Lesia Gabelchuk (Ukraine-Poland), Warsaw Management University, College of Management and Technical Sciences, Management Scientific Club, presented on the *Specifics of the Strategic Leadership in Ukraine*. She began by describing the major current problems in Ukraine, such as unstable environment, lack of experience and lack of will to make a change. With respect to possible strategies of leadership, Ms. Gabelchuk opined that the reluctance to take responsibility for the leadership is a legacy of the Soviet Union mindset deeply rooted in the Ukrainian people. Thus, in her view, people are unable to see goals and benefit other than their own, which reduces the strategic management to a mere business plan. As a result, strategic leadership in Ukraine is only in its infancy.

Thereafter, the delegates were given the opportunity to comment and raise questions on the topics discussed during the panel session. Here, the debate arose as to the China-US relations and the difference between business relations during peace and war. Moreover, the differences between planned economy and market economy were discussed. In particular, the speakers were asked to present their opinion on the state interventions in planned and market economies as well as on the transition from one to another. Finally, the debate turned to the corruption risks related to privatization and the role of the investors in this respect.

Panel Session V – Major Challenges in Combating Money Laundering and Antitrust Issues

Moderator: **Ms. Kim G. Quarles (USA)**

Second Vice President, World Jurist Association, & Senior Vice President, Willis of New York

Doc. Dr. iur. Daniela Nováčková, Ph.D. (Slovakia) and **Doc. RNDr. iur. Darina Saxunová, Ph.D. (Slovakia)**, Comenius University in Bratislava, Faculty of Management, Department of Economics and Finance, started off the panel with their presentation on *Prevention of Proceeds Legalization from Criminal Activity and Auditors and Accountants' Responsibility in Slovakia*. Dr. Nováčková first discussed various notions of fraud and its essential features. She pointed out that in the modern world, fraud and other similar criminal offences are getting more sophisticated, which renders the fight against this type of criminal conduct very difficult. Dr. Nováčková advocated for a systemic approach (a comprehensive fraud policy) with regard to prevention and detection of proceeds legalization from criminal activity and terrorist financing. She further emphasized on the role of auditors, accountants and tax advisors in the fight against this type of criminal activity, together with the difficulties arising in this respect, such as the fear of employees to report money laundering as they might lose their jobs. Then, she turned to the analysis of instruments to fight this type of criminal activity. In this regard, Dr. Nováčková emphasized that criminal law mechanisms may not always be sufficient, pointing out to the rather sporadic numbers of persons prosecuted for these crimes in Slovakia. She also mentioned the restriction of cash payments as a valuable tool in the age of modern technologies and other means of

non-cash payments. At the end of the presentation, Dr. Nováčková provided a comparative analysis of the common methods of detection of serious economic criminality in a number of jurisdictions all around the world.

Dr. Sonja Cindori (Croatia), Assistant Professor, University of Zagreb Faculty of Law, spoke on *Anti-Money Laundering Efforts and Risks Faced By Legal Professionals*. Dr. Cindori's presentation focused on the development of the AML system in Europe, including the European Union legislation. Particular emphasis was placed on the applicability of the AML system mechanisms in cases of professional legal practitioners' participation in money laundering. Referring to the *Michaud v. France* case, she emphasized various principles which come into play in this regard, such as independence of legal practitioners, confidentiality and the protection of the client and his private life. Dr. Cindori pointed out that the considerations on the potential duty of legal practitioners to report suspicious transactions of their clients raise a variety of questions related to conflict of interest. The following debate concerned, among other issues, the possible ways of increasing the general awareness of the risks related to money laundering and terrorist financing, together with the means of fighting and investigating international money laundering. In this regard, **Mgr. iur. Pavla Plachá (Czech Republic)**, Ministry of Justice of the Czech Republic, suggested that it would be very helpful to create an international register of discovered money laundering world-wide, which would contain information on all the persons concerned, thus significantly contributing to the investigation of money laundering in all jurisdictions. This idea was widely embraced by the present delegates to such extent that the WJA representatives considered proposing the idea at the UN Economic and Social Council. Later, the Nigerian delegates also joined the discussion by describing the duties that public bodies have with respect to reporting transactions over a particular amount. Another issue that was discussed was entitling those who report money laundering to a percentage of the amount as the possible way of encouraging the employees and other persons to report money laundering.

Panel Session VI – Cross Border Insolvency Issues (including Jurisdictional Issues and Universal and Territorial Approaches) and EU Regulations

Moderator: Prof. Karel Klíma (Czech Republic)

Professor and Head of Department at the Metropolitan University in Prague and President for WJA's World Association of Law Professors (WALP)

Prof. Dr. Alexander J. Bělohlávek, President of the WJA, Professor of the Faculty of Economics VŠB Ostrava, Czech Republic & Professor of International Law and International Relations WSM Warsaw, Poland, Attorney-at-Law, commenced the panel by presenting his paper on *Ordre Public and Cross Border Insolvency*. Prof. Bělohlávek began his presentation by introducing a terminology problem arising in respect to the terms *ordre public* and public policy. He strongly advocated for distinguishing these two terms from one another since public policy represents a much broader term. Then, he turned to the subject of recognition of bankruptcy decisions among EU Member States, with particular emphasis on the *ordre public* exception. In this regard, Prof. Bělohlávek also elaborated on the notion of COMI (center of main interests) and expressed his doubts as to the definition of the concept, stating that the vagueness of the concept leads to forum-shopping. Also, the problem of forum-shopping entails that the courts of the country in which the COMI is in fact located may be precluded from exercising their jurisdiction as a court of another state might have already upheld its jurisdiction. Finally, Prof. Bělohlávek addressed the issue of extraterritorial effects (outside the EU) of the bankruptcy decisions rendered in the EU.



Prof. Karel Klíma, WJA President for the World Association of Law Professors (WALP) (far right) (©Rob Quarles 2015)



Conference Delegates (©Rob Quarles 2015)

Dr. Krzysztof Gruszczyński, Ph.D. (Poland), Warsaw Management University, College of Administration and Social Sciences, Department of Law, discussed privatization topics in his presentation on *The Strategic Position of Leaders During Privatization Within the Legal Framework*. Firstly, he described the notion of privatization, specifying the reasons thereof and the challenges it brings. The presentation was not limited to the Polish privatization process, but also referred to the privatization in some of the western countries, such as the United Kingdom. Dr. Gruszczyński also pointed out the differences and similarities between Polish and Czech privatization, labeling the Czech privatization as a success. During the subsequent debate, the Nigerian delegates shared their experience with privatization. The discussion eventually turned to the public notion of privatization, which in many cases is perceived as favoring the elite, and the means of overcoming this common misconception.

Friday, 27 March 2015

Panel Session VII – World Bank, UNCITRAL and Other International Institutions’ Model Laws and proposals

Moderator: Ms. Kim G. Quarles (USA)

Second Vice President, World Jurist Association, & Senior Vice President, Willis of New York

Dipl. Ing. (oec) Petra Dvořáková (Czech Republic), Department of Law, Faculty of Economics, VŠB – Technical University of Ostrava representing **Dipl. Ing. (oec.) Martina Krügerová, PhD. (Czech Republic)**, Department of Law, Faculty of Economics, VŠB – Technical University of Ostrava, presented on *Regulation and Stability of the European Financial System at the Global Level*. Ing. Dvořáková began with an introduction of the current regulatory and supervisory framework, emphasizing the importance of distinguishing between regulation and supervision in terms of EU legislation. In her discussion, Ing. Dvořáková focused on the EU monitory system as well as the particular institutions established within the European Financial System. She described the aims of the European Systemic Risk Board as well as the implementation of the recommendations issued by the relevant European institutions, in particular the “act or explain” principle which requires the Member States to either

adopt the recommendation or justify the deviation/discrepancy. Ing. Dvořáková concluded by stating that the interconnection of the financial markets is desirable for the participants of the financial market. However, she pointed out that the European Financial System suffers from a number of shortcomings, in particular the European overregulation and the strengthening of the European dimension at the expense of the national dimension.

Conference Closing

The closing ceremony, which was presided over by the President of the World Jurist Association **Prof. Dr. iur. Alexander J. Bělohávek (Czech Republic)**, was commenced by the Rector of Warsaw Management University **Prof. dr hab. Paweł Stanisław Czarnecki (Poland)** who thanked the WJA for choosing WSM as a venue for the conference on Privatization, Banking and Cross-Border Insolvency. Furthermore, he expressed his hope that the conference will remain in the memory of the delegates as an important event and wished them safe and pleasant trip back home.

Afterwards, **Prof. Dr. iur. Alexander J. Bělohávek (Czech Republic)** thanked not only the delegates of the conference for their participation and engagement in the discussions throughout the individual panels, but also the Warsaw Management University for hosting the event and providing the technical support for the conference. Prof. Bělohávek then went on to summarize the topics discussed at the conference and emphasized the unremitting importance thereof. While expressing his gratitude for having the opportunity to hold the conference, Prof. Bělohávek expressed his special thanks to those individuals who made the event happen: **Ms. Kim G. Quarles (USA)**, Second Vice President of the WJA, **Ms. B. Folake Alexander (USA)**, WJA Programs and Operations Manager, **Mr. František Halfar (Czech Republic)** and mainly **Ms. Lenka Němečková (Czech Republic)**. Finally, Prof. Bělohávek expressed his hope to meet the delegates again, and invited them to participate in future WJA conferences.

The World Jurist Association would like to thank our hosts in Poland, Warsaw Management University for their collaboration and success of the Privatization, Banking and Cross Border Insolvency Conference. We would also like to thank Mr. Rob Quarles for sharing the photos used in this report.



Ms. Kim Quarles, WJA Second Vice President (right), with conference delegates (©Rob Quarles 2015)



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Delegates and Speakers Group photo (©Rob Quarles 2015)



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Conference delegates and speakers above (©Rob Quarles 2015)

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