University of Kiel Conference
Feb. 19 to 21, 2002
The Nord Stream Pipeline

Private Law Aspects

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A) Phases
   1. Construction
   2. Operation

B) Work areas
   1. Construction and Repairs
   2. Financing
   3. Transportation
   4. Maintenance
   5. Officers and Staff
   6. Compliance (organizational, operative, and regulatory)
   7. Insurance
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General remarks

Private law will be mainly contract law. Contracts will have to reflect compulsory legal requirements, which may be based in public law.

This necessitates a circumspect and comprehensive analysis of the legal setting of any and all aspects of the pipeline project.

Thus, the following remarks make up no more than an incentive statement of some bullet points.
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1. Construction and repairs
   comprising of
   - planning
   - purchase of materials and machinery
   - purchase of services
   - purchase of results
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Consequences:

a) No BOT, BOO or similar contracts, but rather owner-determined purchases:
   - The owner takes care of the financing.
   - The owner has a particularly good standing.
   - Project financing is feasible because of the substantial operational cash flow.
   - In contrast to bilateral dealings, here only the owner can deal with the multitude and complexity of multinational questions involved in the project.
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b) All contracts to be negotiated with
- choice of law
- description of mutual main obligations
- delimitation of obligations: timeframes, risk allocation
- ancillary obligations
- guarantees, payment schedules, and security interests
- conflict prevention and resolution:
  = renegotiation and adjustments
  = adjudication, arbitration, mediation, litigation
  = allocation of burden of proof and documentation obligations
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2. Financing

Project financing:
Return of credit funds from operational cash flow = income from gas transportation fees
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Ultra-complex project-specific questions:

- The booking of transportation will depend primarily on the (price) development in the West European gas market(s).

- The maximum transportation fee will be the difference between Russian gas input price and German gas output price.

Will there be transport competition by other pipelines and/or a private or public fee regulation?

- Will there be guarantees by Nord Stream AG shareholders?

- Financing in Rubel or in Euro?
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Nord Stream AG will be the owner of the pipeline. However:
- Which national law determines the scope of the ownership title and the scope and procedures for security interests like liens, mortgages?
  
  Take a look at Artt. 43 et seq. German EGBGB.
  The pipeline and its accessories have to be registered with a flag state. Only registration can determine the applicable national law of ownership title and encumbrances.
- Which national law determines the scope and procedures for the assignment of transportation fee claims?
  
  Take a look at Art. 33 German EGBGB.
  The transportation fee claims will be under the law governing the transportation contract, which may be negotiable. Any fee assignment or security interest in fee claims should be under the same national law as the transportation contract rather than the law of the financing contract.
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3. Transportation
   Gas transportation contracts will determine the core business of the project.
   They will have to be awarded/concluded according to the project business plan.
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The business plan will determine the factual and monetary flexibilities for pipeline pressure and will develop a merit order taking into account:
- shareholder privileges
- pre-existing bookings
- booking time (first come, first served, and ist modifications, e.g. by regular and ad hoc auctioning)
- transportation volume (fixed and variable amounts: a/m/w/h; nomination flexibilities in advance booking time, transportation volume and time; interruptibilities)
- take-or-pay obligations
- duration
- fee structure/payments
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Special points:
- Regulatory and antitrust requirements for pipeline use (potential qualification as a bottle-neck facility under the essential facility doctrine);
  in particular:
  Applicability of EC law
  as e.g.
  EC antitrust provisions and
  EC Regulation 1775/2005 on access to gas grids
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- Determination of the national law applicable to the transportation contracts:
  
  See Art. 27 German EGBGB
  
  = Swiss law, cf. incorporation
  
  = Russian law, cf. input state
  
  = German law, cf. output state
  
  = English law, cf. financing
  
  = Flag state law, cf. pipeline status

Two main aspects for the choice:
1) Attachment of national and supranational regulation
2) Acceptability for transportation customers
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4. Maintenance
- Make or buy decision, cf. 4. Labour and 1. Construction
- Applicability of national state law (public rather than civil law) and national technical rules and standards
  Here again help by flag state registration
- Major compulsion by insurance contracts (for hull, interruption of business, third party liability):
  contractual obligations and premium amounts
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5. Officers and staff
- Organization of Nordstream AG under Swiss law
- Company officials with Swiss employment contracts
- Company staff with employment contracts under
  = Swiss law
  = the flag state law
  or
  = the law of a business establishment, if on territorial
    ground (Russia, Germany);
for the latter two applications also check over-reaching
compulsory employment regulation by other states.
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6. Compliance
   a) Swiss company law and accounting rules;
      general rules on good company governance;
      specific company rules and procedures
   b) Antitrust rules:
      - Switzerland
      - Antitrust effects doctrine and place of operation
      - Personal jurisdiction and shareholder liability
   c) Energy regulation:
      - EC shareholder liability?
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d) Technical safety and labour regulation
e) Environmental regulation
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Problem of conflicting requirements:

To which extent is a business measure or procedure justified, if one state allows or requires a behaviour in contrast to the rules or rulings of another state,

e.g.

- in the case of a conflict of the compulsory nature of a shareholder majority decision under Swiss company law and an EC or Russian antitrust or regulatory requirement?
- in the case of a Russian political request and an EC antitrust or regulatory network access or transportation fee reduction?
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7. Insurance
Risk management
- Contractual and compliance risk management
- Contractual risk allocation and reduction
- Factual risk management (by your own controls)
- Hedging as a tool of liability risk reduction in case of transportation failure

Insurance coverage
- D & O Liability
- Pipeline: Hull, interruption or loss of business operation, third party liability
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Thank you for your kind attention.