

4th European Insolvency & Restructuring Congress, 25 June 2015, Brussels

The fourth European Insolvency & Restructuring Congress was held in Brussels this year by *Arbeitsgemeinschaft Insolvenzrecht und Sanierung im Deutschen Anwaltverein* (German Bar Association's Section on Insolvency Law and Restructuring) along with French association *Conseil National des Administrateurs Judiciaires et des Mandataires Judiciaires* (National Council of Judicial Administrators and Representatives). As in years past, insolvency practitioners, academics and representatives from the European Commission had lively and productive discussions regarding recent developments in European insolvency law.

After an introduction by *Dr Martin Prager* and *Marc Andre, Michael Shotter* – from the Commission's Directorate-General for Justice – delved into the new version of the EIR that was recently published, which he believes to allow significant room for additional reform efforts, e.g. regarding standardisation of substantive insolvency law. In particular, he considers the restructuring processes for companies as well as for natural persons to be markedly distinct in the member states. *Mr Shotter* reported that the Commission is currently comparing the insolvency laws in the EU member states. It is anticipated that results from the study will be obtained in early 2016. He explained that well-functioning insolvency laws significantly contribute to economic development and are thus an important basis for investments. As a result of this, increased standardisation of the insolvency regulations – with an arrangement similar to that of the US – is highly desirable.

Economist *Marc Ferracci* from the University of Nantes then discussed the current state of research and the existing data on the economic impact of each applicable insolvency regime, which he claims had an indirect impact on lending in particular and thus on the economy of the country as a whole. He made a distinction between creditor-focused legal systems and regulations that are primarily geared towards a company's survival and job preservation. Based on a study by *Davydenko/Francks* in the *Journal of Finance* (2008), *Mr Ferracci* projects that lending will become easier in states that are overly protective of creditors – e.g. the United Kingdom – and that it will also be cheaper to lend. On the other hand, insolvency laws favouring employees, such as in France, have a negative impact on salaries in (previously) insolvent companies.

The topic of the first panel discussion was the new version of the EIR that is now available and will take effect as of mid-2017. *Mihaela Carpus Carcea* from the European Commission gave the first presentation detailing the new regulations. Afterwards, *Dr Stephan Madaus* took a closer look at the new regulations on international insolvency proceedings, which are largely confined to rules for coordinating individual proceedings within an insolvent group. In any event, the EIR will make it possible to arrange for suspension of recovery operations in the individual proceedings if this is required to protect a restructuring plan for the group of companies concerned. In addition, the new regulation restricts secondary proceedings from being initiated in certain cases. In closing, *Dr Madaus* asked whether coordination proceedings would be ineffective in practice since – as in the past – the administrators involved are not obligated to take part in coordination of the proceedings. Speaking from the perspective of the banks, *Hans Joachim Weidtmann* noted that solutions found outside of court are frequently preferred, since insolvency still has a certain stigma. *Daniel F. Fritz* discussed the regulations that have not been changed since there are still various unresolved problems such as how to handle rights in rem in international insolvencies. The panel discussion participants generally agreed that the coordination regulations were ultimately very complicated and that they may thus have little practical import.

The famous "scheme of arrangement" for the APCOA PARKING group of companies was discussed during the next panel. *Richard Snowden*, former Justice on the High Court in London, explained the requirements for a scheme. In particular, he noted the important and difficult role of the judge, especially when examining the applicability of the regulations. *Philip Hertz* and *Dr Stefan Sax* gave a detailed description of how the proceedings were configured for the scheme in practice from the British and the German perspective. The advantage of the scheme in the APCOA PARKING case was that it kept the parent company from becoming insolvent and having far-reaching negative consequences. *Dr Volker Kammel* regarded the scheme as a practicable method for restructuring a group of companies.

Those attending were able to choose from among three workshops in the afternoon:

The first workshop was led by *Dr Andreas Spahlinger* and dealt with the restructuring of bonds. Panellists *Tony Horspool* and *Mark Hoffmann* from London, *Johan Häger* from Stockholm and *Dr Kai Arne Birke* from Frankfurt am Main began by discussing the business environment. Based on the fact

that numerous bonds will mature in the next few years and the foreseeable difficulties in refinancing, the panellists anticipate that the need for restructuring will increase. One problem noted was that it is frequently not until much too late that bondholders are summoned to creditors' meetings by the parties involved. The panellists also generally find it is difficult to reach an agreement among the separate creditors in the early stages of a potential insolvency, since there is often a lack of common representatives capable of acting. In particular, the participants highlighted the *Schuldverschreibungsgesetz* (German Bond Act), which includes a cram-down mechanism.

The recommendation by the Commission has reinvigorated a discussion that was the topic of the second workshops: whether pre-insolvency restructuring proceedings are necessary or beneficial. *Marie Luise Graf-Schlicker* began by describing the legal situation in Germany. *Sophie Vermeille* gave a very critical description of the legal situation in France. In France, various procedures have recently been introduced that are specifically targeted at facilitating pre-insolvency restructuring outside of court by easing the requirement of unanimity. She argued that this satisfies the European Commission's requirements formally speaking, but that in concrete terms, these procedures are not effective enough. According to *Ms. Vermeille*, French insolvency law as a whole is hardly creditor-focused, instead favouring the other parties involved including shareholders. She believes it is generally in need of reform. Professor *Ignacio Tirado* from the University of Madrid described legal developments in Spain in recent years. He argued that during the financial crisis, it became evident that having too strict of an obligation to file for insolvency results in increased filing, which places an excessive burden on all the parties involved, especially the courts. Regulations on refinancing insolvent companies were introduced into Spanish law, providing them with better protection than previously in the event of a secondary insolvency. The discussion that followed dealt with the British "scheme of arrangement", which is not well-suited as a pre-insolvency proceeding in practice, however. *Dr Madaus* noted that pre-insolvency proceedings are more suitable for larger companies.

Stephane Gorrias from Paris, *Rein J. Philips* from Amsterdam, and *Luís Martín* from Madrid participated in the third workshop led by *Patrick Ehret*, discussing the latest insolvency law reforms in France, the Netherlands, Spain and Germany.

This was followed by a recap of the workshops by each of the moderators, after which *Martin Prager* bid the attendees farewell. The German Bar Association's Section on Insolvency Law and Restructuring has successfully established the EIRC as a regular event and as a key element in the development of the European insolvency law. This was made particularly evident by the European Commission members who actively participated and by the number of practitioners and academics from various jurisdictions in attendance of the congress. It is questionable whether the event will be able to leave the topic of EU member state insolvency undiscussed again next year, however.

Dr Rolf Leithaus (lawyer), Cologne