

First concrete outlines of EU harmonisation

Brussels. *The European Insolvency Congress of the Arbeitsgemeinschaft Insolvenzrecht und Sanierung im Deutschen Anwaltverein (German Bar Association's Section on Insolvency Law and Restructuring), which was held in Brussels on 16 and 17 June 2016, provided an opportunity for lively discussion among insolvency experts from different European countries and representatives of the European Commission. This year, the co-organiser was Spain's Asociación Profesional de Administradores Concursales (ASPAC). The importance of the congress as a forum for discussion at the European level can also be seen in the fact that half of the roughly 100 participants in the event were not from Germany and that the event was attended by experts from a total of 11 different countries.*

Text: *Christian Staps, attorney from the offices of Heuking Kühn Lüer Wojtek*

The theme of this year's Insolvency & Restructuring Congress was devoted entirely to efforts to harmonise the substantive insolvency laws of member states. The discussion centred on the legislative proposal for pre-insolvency rescue proceedings announced for the fourth quarter by the EU Commission. Mihaela Carpus-Carcea from the Directorate General for Justice and Consumers of the European Commission gave a brief progress report on the topic. Following words of welcome by Dr Martin Prager, attorney at law and Chairman of the German Bar Association's Section on Insolvency Law and Restructuring, the first speaker was Vera Jourová, EU Commissioner for Justice, Consumers and Gender Equality. She talked about the goals being pursued by the Commission in the area of insolvency law. First, she emphasised the tremendous importance the Commission places on insolvency law. She said that harmonisation in the area of substantive law is needed after the passage of the new version of the European Insolvency Regulation (EIR), which is limited to procedural law. There are still major differences among the member states, she pointed out. In many jurisdictions, insolvency proceedings still regularly end up in liquidation. Accordingly, there is a negative perception of them. The recovery rates to be achieved vary considerably in each member state and are higher in legal systems that allow for restructuring. In addition, the waiting periods until bankruptcy discharge are too long in many member states. She said bankruptcy should no longer be stigmatised, adding that this goal cannot be achieved by legislation alone. However, it should be possible to establish legal conditions that enable businesses and consumers to start over, financially speaking, following insolvency. She asserted that a »culture of second chances« needs to be created in order to prevent good business ideas from not being realised for fear of failure. This is why the

Commission recommended in March that member states devise a legal framework that makes it possible for companies to restructure and that allows businesses and consumers to have that second chance. Not every member state implemented the Commission's recommendation, she noted. Investors in Europe are still confronted with 28 different systems of insolvency law. So, the Commission decided to establish a framework within the EU that focuses on restructuring. Ms Jourová described the modernisation and harmonisation of insolvency law as a daunting challenge but one that is worth accepting.



Afterwards, Jan Schilbach – head of the Banking, Financial Markets and Regulation team at Deutsche Bank Research in Frankfurt am Main – gave an overview of the impact of bad loans on banks and clients in Europe and the United States. Schilbach stated that borrowers were benefiting from low interest rates,



Panel on minimum standards of harmonisation: (from left) Mihaela Carpus-Carcea; Alice van der Schee; Moderator Daniel F. Fritz, attorney at law; Prof. Juan Sánchez-Calero; Luciano Panzani; Dr Miriam Parmentier

leading to improved quality of loans issued by the banks. He claimed, however, that the steps taken to reduce the number of non-performing loans in the US were far more aggressive. Banks located there are now profiting from this. Europe had tended to drag its feet on the issue, allowing bad loans to remain a heavy burden on banks. On top of that, he said, European banks are suffering from low interest rates and strict capital requirements. For companies, however, terms of financing have never been as affordable as they are now.

EU consultation: 30% of responses come from Germany

The panel discussion that followed was moderated by attorney Daniel F. Fritz, spokesman for the European Group of the German Bar Association's Section on Insolvency Law and Restructuring. It dealt with minimum standards for harmonised restructuring and insolvency law within the European Union. The members on the panel were Ms Carpus-Carcea; Dr Miriam Parmentier, the Directorate-General's national expert on Financial Stability, Financial Services and Capital Markets Union and another representative of the EU Commission; Prof. Juan Sánchez-Calero from the Complutense University of Madrid; Luciano Panzani, President of the Court of Appeals in Rome; and attorney Alice van der Schee from Utrecht. Ms Parmentier started off by providing an overview of the Commission's plan of action for creating a capital market union. In the field of insolvency law, the plan contains the previously mentioned minimum standards of harmonisation for restructuring and allows for the granting of second chances. In addition, attempts are being made to improve the required recovery rates. The goal is not to introduce legislative measures or harmonisation but to increase the efficiency of proceedings. Ms Carpus-Carcea then gave some insight into the work being done by the Commission on the draft to create a legal framework for pre-insolvency rescue proceed-

ings. She was pleased that 50% of the opinions during the consultation process were received from practitioners of insolvency law. Having supplied 30% of the responses, Germany had the largest impact, she said. Ms Carpus-Carcea explained that the new instrument was based on the recommendations from 2014 and on the associated consultations that took place. Like Ms Jourová, she also stressed the need to finally bring about convergence among member states in the area of substantive insolvency law. However, the panel of experts revealed that it is not easy to find the right concepts and preventive measures against abuse of the procedure. She said a detailed insolvency code was not to be expected. Instead, the draft only laid out certain principles. One principle is that honest companies should be given the chance to start over financially and the opportunity to have their bankruptcy discharged within a reasonable amount of time. However, the majority of the proposal deals with early corporate restructuring. She explained that the legislation would create a pre-insolvency rescue process in all member states that every other member state would be required to recognise. The process should offer flexibility as to whether it is conducted confidentially. It would be available only if, at the start of closed-door negotiations, there is not yet a legal obligation to submit a request to open insolvency proceedings. Even on the issue of a moratorium, the process needs to be flexible. A moratorium should be possible but not mandatory, and there should be a way to limit it to individual creditors. The options and the benefits of early restructuring should be explained to small and medium-sized businesses. They should also be given a checklist telling them what documents they are required to submit for a restructuring plan. It must be made impossible for shareholders who are »out of the money« to prevent restructuring proceedings. However, the method of doing so (for example, cramdown) is up to the member states. As part of the consultation process, she noted, they had been notified of additional items of interest that had not previously been included in the recommendations. In particular, these concerned bet-



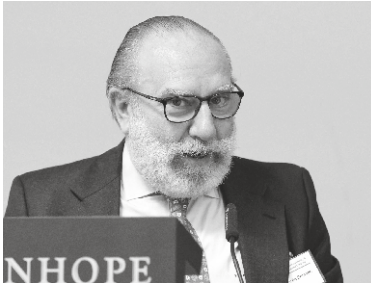
EU Commissioner for Justice, Vera Jourová; and Dr Martin Prager, attorney at law; Chairman of German Bar Association's (DAV) Section on Insolvency Law and Restructuring

ter protection for the financing that was granted for the period of the negotiations. Efforts are also being made to establish common standards for the legal professionals involved. For example, it must be ensured that judges possess the necessary expertise and appropriate specialisation. The possibility of bankruptcy discharge needs to be introduced in all member states in order to give companies a second chance. Member states are tending towards periods of three years for discharging bankruptcy. It should be left up to the member states to regulate how often bankruptcies can be discharged and how much time is required to pass between individual cases of bankruptcy discharge. Ms Carpus-Carcea said it was important to prevent abuse and find a balance between the interests of debtors and those of their creditors. Someone in the audience asked whether the Commission also intended to make changes in management's duties with respect to submitting requests to open insolvency proceedings. Otherwise, if there continues to be no requirement to file a request at the start of the pre-insolvency proceedings, this may render the process practically meaningless in some member states. Ms Carpus-Carcea responded by saying that the new procedure prior to insolvency should apply whenever restructuring is still likely. It should be possible to recognise the procedure under the EIR. In most member states, insolvency is understood to mean only an inability to pay. It remains to be seen whether this will be made a requirement for all member states. Mr Fritz also viewed this point as vital. If the pre-insolvency procedure is not considered in cases of over-indebtedness, it would remain ineffective, he said. So, he suggested taking into account the likelihood of insolvency and not demanding that a person's or organisation's liabilities exceed their assets. Mr Panzani agreed. The court could prevent misuse of the procedure, and creditors could be provided with options for defending their interests. Members of the audience also supported that view. The procedure would need to be applied as soon as deemed necessary by the parties involved. At the same

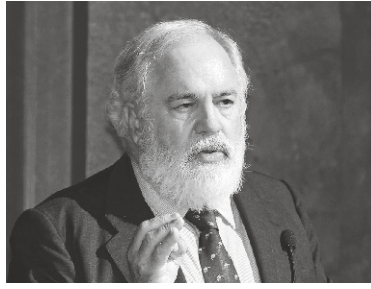
time, a mechanism would have to be put in place to prevent the procedure from being abused. It cannot be assumed that debtors would avail themselves of the procedure even though they are not having difficulties.

Schemes of arrangement and SchVG 2009 as models

Pre-insolvency rescue proceedings as a magic cure was also the subject of the most heavily attended afternoon workshop. First, Rubén Garcia-Quismondo, an insolvency administrator from Madrid, introduced the Spanish scheme of arrangement. He explained that this scheme is a successful process that has been used by many companies for the past two years. Stephen Harris from Ernst & Young in London explained the »London Approach« to reaching mutual agreements on restructuring. It was developed in London in the early 1990s as a result of increasing syndicate financing and has since been replicated all over the world. Ultimately, schemes of arrangement only need to be implemented in order to bind dissenting creditors. The recent success of these schemes can be explained by the large numbers of creditors involved in restructuring these days, he said. The talk held by Dr Holger Ellers, an attorney from Berlin, touched on a similar vein. He gave a presentation on the procedure for out-of-court restructuring in Germany and the options for binding dissenting creditors via majority resolution already contained in the German Debt Securities Act. Based on the typical process for out-of-court restructuring, he elaborated on three points that need to be addressed in a pre-insolvency rescue process: the existing liability risks for the parties involved, the urgency resulting from insolvency filing obligations and the problem of individuals attempting to intervene in any settlement. Axel W. Bierbach, an attorney from Munich, then provided an overview of the »protective shield« proceedings pursuant to Section 270b



Luis Martín, President of ASPAC



EU Energy Commissioner Miguel Arias Cañete gave his dinner speech on renewable energies at Solvay Library in Brussels European Quarter on 16 June 2016.

of Germany's Insolvenzordnung (InsO – Insolvency Code). He presented the case for a pre-insolvency procedure that is less complicated and manages with less court involvement. It would have to be transparent, provide a cramdown option and allow restriction to selected liabilities.

Harmonising challenges presents many pitfalls

Another workshop dealt with the issue of potentially harmonising the right to contest insolvency. The panel discussion was moderated by Professor Harry Rajak from the School of Law at the University of Sussex. Members of the panel were Prof. Christoph G. Paulus, LL. M., from Humboldt University in Berlin and Ignacio Sancho from Spain's Supreme Court in Madrid. One takeaway from the workshop was that, although every country concerned has similar regulations for enforcing the principle of equal treatment of creditors, there are also numerous pitfalls that make it seem less advisable to prioritise harmonisation in this area.

A third workshop, moderated by Prof. Heinz Vallender from the Institute for International and European Insolvency Law at the University of Cologne, explored the subject of bankruptcy discharge. Panellists included Jacinto Talens, Justice at the Commercial Court in Valencia; David Grasa, an attorney from Barcelona; Stephen Baister, Chief Bankruptcy Registrar at the Royal Courts of Justice in London; Michal Nowicki from Ostrów

Wielkopolski in Poland; and Hildegard Allemand, an attorney from Cologne. The workshop compared the options for bankruptcy discharge in Spain, Poland, Germany and the UK. The final conclusion was that harmonisation in this area would need to take each country's legal culture into account. It would apparently not be ideal to have the same conditions everywhere. There was agreement, however, that the procedure for bankruptcy discharge must not be too expensive or take excessively long.

The next day, Lucas P. Kortmann, a lawyer from Amsterdam, discussed issues of management and shareholder liability in a cross-border context. He made it clear that the question of applicable law always needs to be answered when assessing liability risks in cases of cross-border insolvency. Afterwards, Micha Guttman from Guttman Communications in Cologne/Berlin and Johan van Laer from Burson Marsteller in Brussels introduced several ground rules for crisis communication in the event of insolvency. Then, Hervé Diogo Amengual, an attorney from Paris, and Dan Glosband, an insolvency consultant from Boston, ended the seminar by comparing the options provided by European and American insolvency law under the moderation of Brigitte Umbach-Spahn, a lawyer from Zurich.

In his concluding remarks, Luis Martín, President of ASPAC, hailed the event as a congress that unites insolvency experts from various countries and allows for superb discussion. Mr Fritz expressed his satisfaction with the seminar. He compared insolvency law in Europe to a house with some parts needing maintenance and others currently being renovated. <<



Summary of the three workshops presented by (from left) Professor Harry Rajak; Moderator Patrick Ehret, attorney at law; Rubén Garcia-Quismondo, Prof. Dr Heinz Vallender