Let’s stay connected!

Brussels. The 4th European Insolvency and Restructuring Congress in Brussels on 24 and 25 June 2015, organised by the Arbeitsgemeinschaft Insolvenzrecht und Sanierung im Deutschen Anwaltverein (German Bar Association’s Section on Insolvency Law and Restructuring) together with the Conseil National des Administrateurs Judiciaires et des Mandataires Judiciaires (French National Council of Judicial Administrators and Representatives), was dedicated entirely to the European Insolvency Regulation that has just been revised and the reforms of the national insolvency legislation of the member states that have already been made and that may soon loom again on account of the recommendations of the European Commission. The discussions focused primarily on the practical example of a scheme of arrangement in the Apcoa Parking case, the reforms in individual member states and the pre-insolvency restructuring process.

Text: Christian Stap, lawyer at Heuking Kühn Lüer Wojtek

A hot topic at the congress turned out to be the introduction, recommended by the European Commission, of a preventive restructuring process, which has been especially lacking in Germany until now. The fact that the lawyers involved in the restructuring of Apcoa Parking were able to report at first hand on their experience with the British scheme of arrangement as an example of a well-established preventive restructuring process naturally offered a perfect fit for the topic. The welcome and introduction to the agenda by Dr Martin Prager, the chair of the German Bar Association’s Section on Insolvency Law and Restructuring, and Marc André of the Conseil National des Administrateurs Judiciaires et des Mandataires Judiciaires was followed by the address by this year’s keynote speaker, Michael Shotten of the Directorate-General for Justice and Consumers of the European Commission. Shotten first of all highlighted the fact that the 4th European Insolvency and Restructuring Congress was continuing to develop in the direction of an international congress and offered encouragement to the insolvency practitioners in their exchanges with the European legislators. He then spoke about the new version of the European Insolvency Regulation (EIR) and expressed his satisfaction that it had taken proposals of the Commission into consideration, with the regulation now including preventive restructuring processes, clarifying outstanding issues of jurisdiction, creating a European insolvency register and improving the situation of insolvent groups of companies by introducing group co-ordination proceedings. Shotten went on to say that the new rules would create mutual trust and that they were modern, efficient and suitable for successfully dealing with international insolvencies. He also stressed, however, that the EIR still only represented regulations on jurisdiction and there was therefore a need for further action. He called for a stronger focus to be placed on restructuring and for viable companies to be given a second chance. According to Shotten, the different insolvency systems in the member states made it difficult for investors to assess the risks in the event of insolvency. The commission had therefore recommended that the earliest possible institution of proceedings be facilitated in all member states, the periods for bankruptcy discharge be shortened and access to private insolvency proceedings be facilitated. The commission was currently assessing information from member states on how their legislation addressed the recommendations. Furthermore, related legal areas had been examined. A report could be expected in January 2016. Shotten regarded it as unlikely that the rules would be standardised. However, it was possible that the result would extend beyond a mere recommendation. However, the issue was ultimately subject to a political decision.

Insolvency legislation lacks empirical studies

Marc Ferracci, Professor of Economics at the University of Nantes, then reported on the economic impact of the insolvency legislation. In doing so, he made it clear that the main problems
in determining the influence of the insolvency legislation involved the generation of the right comparative case and access to empirical data. Companies that shared similar features, but that were subject to different legal systems had to be compared. According to Ferracci, the previous empirical evidence had suggested that creditor-friendly legislation had a positive impact on the continuation of companies, the extension of credit in the future and the level of the recovery rate achieved. However, there was still a dearth of long-term studies on how the legislation affected the development of the lending market. Moreover, the social costs of job losses could be considerable.

The EIR: expanded by preventive restructuring processes

Following the presentation by Professor Ferracci, Daniel F. Fritz, speaker of the Working Group Europe of the German Bar Association’s Section on Insolvency Law and Restructuring, moderated an analysis and discussion of the revised EIR. The participants in the discussion were Mihaela Cupus-Carcea of the Directorate-General for Justice of the European Commission, Professor Stephan Madaus of the Martin Luther University Halle-Wittenberg and Hans Joachim Weidtmann of Commerzbank AG. Cupus-Carcea, who worked on the text of the new version, first gave an overview of the new regulations. She explained here that the EIR had moved away from the focus on liquidation, and its scope had instead been expanded to preventive restructuring processes. The recognition of these processes was in line with the developments in member states, two thirds of which already had a similar procedure. The introduction of preventive restructuring processes increased resilience against economic shocks and offered solutions for dealing with non-performing loans. For this reason, the introduction of preventive restructuring measures was also the subject of a Commission recommendation. The question now was how the recommendation could be advanced. Following the subsequent discussion on the new regulations, Professor Madaus addressed individual aspects of the new group co-ordination proceedings. He began by clarifying that no group COMI had been introduced. Joint legal jurisdiction existed only if the companies of a group had the same COMI. In principle, there would continue to be as many insolvency proceedings as there were group companies. Only duties of co-operation and communication existed, as between primary and secondary insolvency proceedings. Madaus furthermore addressed the possibility of preventing local insolvency proceedings involving the assets of subsidiaries. In this respect until now, virtual secondary proceedings had been possible, in which the insolvency administrator in the primary insolvency proceedings promised the local creditors that the assets would
be distributed to them in accordance with local law. This option could be found in the EIR form of the unilateral assurance of the administrator in the primary insolvency proceedings. However, this assurance was not even unilateral, but required majority approval in the country in question.

**Scheme of Arrangement in many jurisdictions**

In the subsequent restructuring case study on Apcoa Parking moderated by Peter Hoegen of the Working Group Europe of the German Bar Association’s Section on Insolvency Law and Restructuring, Sir Richard Snowden, Philip Hertz, Dr Volker Kammel and Dr Stefan Sax addressed the motives behind the course chosen in the case and what had been learned from it. Snowden – involved in the Apcoa case while he was still Queen’s Counsel therefore did not matter whether the COMI of a company was located in the United Kingdom. Rather, all that was required was a sufficient connection between the scheme and the United Kingdom. In the Rodenstock and Apcoa cases, this had consisted in the fact that the loan liabilities had been subject to English law. The distinguishing feature at Apcoa had been that German law had originally applied to the loans, but the applicable law had been changed to English law to allow the scheme to be implemented. Kammel criticised the fact that the rights of the minority creditors had not been sufficiently protected at Apcoa Parking. Sax said that the reason why Apcoa Parking had gone for the scheme of arrangement was that the group was scattered across numerous jurisdictions in Europe. The solution had had to aim at stabilising the borrowers in the various jurisdictions using a uniform instrument.

**Scheme must be fair and reasonable**

Hertz subsequently outlined the problems in the restructuring of Apcoa Parking. A cash pool facility had been terminated in November 2013. Creditors were found who were prepared to provide a loan of EUR 30 million, however only on condition that it was a preferential claim. Two creditors refused to approve the preferential right. The other creditors subsequently undertook to pay out the proceeds achieved on their loans to the preferential creditors. When an agreement was later reached on the scheme, which provided for an upfront payment of EUR 30 million to the preferential creditors, the two dissenting creditors argued that their claims were not subordinate, they therefore had to form their own group. Kammel noted that his client had not approved the subordination. There was therefore no comprehensible reason why other creditors should receive EUR 30 million in advance. Snowden stated that, during the division into groups, the court asked what rights the creditors had against the company without the scheme. It examined whether there was more that united the creditors than divided them, such that it could be expected that they would sit down together for discussions. In practical terms, it was true that the judge came and since appointed Justice of the High Court in London and made a knight – began by explaining how a scheme of arrangement works. In the scheme, it was possible for the court to approve an agreement between the company and its creditors or between the company and its shareholders. The agreement of the creditors was reached in groups that shared adequately similar interests. As the scheme did not represent insolvency proceedings, it was excluded from the annexe to the EIR.
under significant pressure in the face of an impending messy insolvency with considerable job losses. The judge ultimately had to be convinced that his decision would be recognised and had to examine whether the scheme was fair and reasonable.

Waiting for ESUG experiences before taking the next steps

The introduction of a preventive restructuring process was also the subject of one of the workshops held in the afternoon. Participants in the panel discussion moderated by Florian Bruder were Marie Luise Graf-Schlicker, head of department at the German Ministry of Justice and for Consumer Protection, Sophie Vermeille, a lawyer from Paris, and Professor Ignacio Tirado of the University of Madrid. In his presentation kicking off the workshop, Bruder provided an overview of the issue. Graf-Schlicker subsequently reported on the German view of the Commission’s recommendation to create a preventive restructuring process. Restructuring options already existed in Germany within formal court proceedings. There was no separate procedure that preceded the formal insolvency proceedings. There were basically no objections to a debate on reform. Germany, however, should wait for the experiences of the reform gained by the ESUG. Graf-Schlicker expressed concerns relating to the ownership guarantee. If insolvency was not a precondition for the proceedings, full recoverability of the creditors’ claims had to be assumed in principle. Interference with these claims might therefore violate the German constitution and the Charter of Fundamental Rights of the European Union. Without the involvement of the courts, it could furthermore not be guaranteed that companies where the liquidation value was higher than their restructuring value would be excluded from a preventive restructuring process. That a process could be easily abused would be at odds with the creation of a culture of restructuring. A preventive restructuring process also had to be integrated in the respective national legal and economic systems. For this there was as yet no harmonisation of the related legal fields. Finally, Graf-Schlicker suggested defining only cornerstones at the European level – early restructuring option, debtor in possession, insolvency plan – and otherwise leaving it to the member states to develop their own law themselves.

Vermeille, who reported on the issue from the French perspective, made it clear at the very start that she represented something of a minority opinion in her home country. France in fact already had a variety of preventive restructuring processes – mandat ad’hoc, conciliation, sauvegarde accélérée, sauvegarde financière accélérée – as recommended by the Commission. Vermeille also introduced these briefly as part of her presentation. According to her, however, the processes lead to inefficient re-

(from the left) Sophie Vermeille, Prof. Ignacio Tirado, Marie Luise Graf-Schlicker, Dr Florian Bruder
not necessarily win the award. There was a lack of rules for
evaluating a company in difficulties, while furthermore an «ab-
solute priority rule» as in US law would have to be introduced.

Tirado subsequently offered an overview of the out-of-court
restructuring process in Spain. He started by stating that there
had not been any changes to Spanish insolvency law for over
100 years until 2003. The 2003 reform, which came into effect
in 2004, had then introduced uniform insolvency proceedings
that could go in two different directions. The defects in the new
law had become apparent during the financial crisis, however.
In particular, the introduction of a duty to apply for insolvency
had led to so many applications that the court system had col-
lapsed under their weight. Further changes had therefore fol-
«permanent revolution» in this respect. There were now three
different out-of-court processes in Spain. The «pre-negotiated
agreement» (convenio anticipado) was reached out of court and
submitted together with the application to open insolvency
proceedings. The other options included the out-of-court pay-
ment agreements (acuerdo extrajudicial de pagos) for very
small, small and medium-sized companies and the refinancing
agreements (acuerdos de refinanciación) for small and medi-
um-sized companies. These last two offered protection against
any later contesting of the insolvency.

Still more restructurings
in the bond context

The workshop on the restructuring of bonds was moderated
by Andreas Spahlinger, Working Group Europe of the German Bar
Association’s Section on Insolvency Law and Restructuring.
Taking part in the panel discussion were Tony Horspool and Mark
Hoffmann from London, Johan Häger from Stockholm and Dr Kai
Birke from Frankfurt. The workshop recognised that there has
been a rise in the issue of new bonds. The volume is ten times
greater today than just five to seven years ago. Issues have set
new records in the last few years. But the number of restructur-
ings has also increased in recent years. The restructuring
process was often initiated too late. The organisation of the
bondholders was here regarded as extremely difficult by the
panellists. The majority of the work, however, involved the de-
velopment and implementation of a restructuring plan. Nervous
restructuring cases could be expected in the near future on
account of upcoming maturities.

The participants in Workshop III discussed the most recent
insolvency reforms in France, the Netherlands, Spain and Ger-
many. An overview of the reforms in France was provided by
Stéphane Gorrias. Rein J. Philips reported on the reforms in the
Netherlands, Spain was the subject of the presentation by Luis
Martin, while Patrick Ehret, who also moderated the workshop,
spoke about the three-stage insolvency law reform in Germany.
The last word at the conference belonged to Fritz, who sum-
marised the numerous interconnections between the topics that
were discussed and with this in mind bade farewell to the par-
ticipants with a simple request: «Let’s stay connected!»

(from the left) Patrick Ehret, Luis Martin,
Rein J. Philips, Stéphane Gorrias

(from the left) Tony Horspool, Dr Kai Birke, Johan Häger, Mark Hoffmann, Dr Andreas Spahlinger