**7th European Insolvency & Restructuring Congress**

**28 & 29 June 2018, Brussels**

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The 7th European Insolvency & Restructuring Congress tookplace in Brussels on 28 & 29 June 2018. The Congress was organised by the Insolvency Law and Restructuring section of the German Bar Association (DAV) through its European Working Group in cooperation with INSOL Europe and the ReTurn Association.

The Congress started with a welcome and opening remarks from Jörn Weitzmann (German Bar Association) and Steffen Koch (INSOL Europe Past President) in the presence of 95 delegates representing 14 different jurisdictions: Austria, Belgium, Cyprus, Estonia, France, Germany, Greece, Italy, Poland, Singapore, Spain, the Netherlands, the UK and the US.

The Congress continued with the keynote speech by Tiina Astola, Director-General, DG Justice, Consumers and Gender Equality. Firstly, a reminder was given that the European Commission is currently working on several initiatives (DG Justice initiative on preventive frameworks, DG Fisma initiative on collateral and EU participation at UNCITRAL Working Group V meetings) to supplement the set of new EU rules already in place with the entry into force of the (Recast) Insolvency Regulation on 26 June 2017. Secondly, emphasis was put on the EU adoption agenda of the European Commission’s Directive proposal on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures published on 22 November 2016 ( ‘Directive proposal’). The Director-General stressed the importance for practitioners to be able to use these rules as soon as possible for the benefit of distressed companies and entrepreneurs. The audience was also informed that, though a partial general approach has already been reached (meaning that even if there are preliminary decisions on agreed articles, negotiations are on-going for other provisions still to be agreed), it remained important to reach an agreement between the Council of the European Union and the European Parliament before the European Parliament elections in May 2019.

Prof. Dr. Stephan Madaus then delivered a lecture on the need for a doctrinal foundation for the Preventive Framework. Firstly, Prof. Dr. Madaus reminded conference that his presentation was based on the outcomes of the European Law Institute’s (ELI) Instrument on Rescue of Business in Insolvency Law (September 2017). On the basis of the conclusions of that project, Prof. Dr. Madaus presented the doctrinal foundations existing between insolvency and restructuring proceedings. If the common result of those proceedings was aimed at obtaining debt cancellation, Prof. Dr. Madaus also insisted on their differences in light of the ‘contractual approach’ (in/solvent debtors, no/common pool and market/negotiated value) and its implications for cross-border frameworks in terms of choice of law rules for contracts. That was the reason why a special plea was made consequently for the reconsideration of Articles 1(1) and 32(1) of the EIR and Article 13 (f) of the UNCITRAL draft model law on recognition of cross-border insolvency judgments.

Before lunch, a panel on the Directive proposal took place. Firstly, Emil Radev emphasised the need to build a common culture of rehabilitation in Europe. He also presented the key issues in the Directive proposal and in particular the concerns of the European Parliament on matters such as voting rights, the role of employees, the meaning of ‘*unaffected’* creditors and the role of insolvency practitioners. Secondly, Andréas Stein updated the audience with the EU legislative adoption process concluding that Member States need to agree on a text by October 2018 to ensure the adoption of the Directive Proposal in March 2019 before the EP elections. On substance, he focused on three issues still to be discussed within the Council of the EU, namely the degree of involvement of Courts and IPs, the desirability (and difficulty) of introducing an adequate viability test and the requisite conditions for applying the cross-class cram down mechanism. Thirdly, Béatrice Dunogué-Gaffié provided a reminder of the role of the EIP (‘European Association of Insolvency Practitioner’s organisations’) and put the emphasis on the importance of the daily work of French IPs and the numerous French attractive and effective legal tools aimed at rescuing as far in advance as possible enterprises in financial distress. The Recommendations of the EIP would be to limit the scope of the Directive proposal to solvent debtors only, to ensure a stay with a minimum period of 3 months (renewable), to limit the use of the cross-class cram down at the sole initiative of the debtor and to exclude employees from the restructuring process, as far as their fate was to be regulated by other provisions.

After lunch, two workshops were made available to delegates. The first workshop focused on challenges of digitisation and legal tech in restructuring and insolvency. If the importance of data collection was stressed, it was also noted that artificial intelligence should be carefully used with some limits. The Dutch experience of digitisation particularly showed that there is a need to provide an easy access to data, ensuring both quality and transparency. Blockchains allowing everything to be traced and thus providing a certain degree of transparency as well were mentioned. The panel concluded that, though the use of legal tech in restructuring and insolvency proceedings was more than welcome, some burdens still remain because of the cultural differences between jurisdictions.

The second workshop examined the available options for secured creditors in or out of court in several jurisdictions (Austria, France, Germany, Greece and the Netherlands). The outcome of the panel was that, even if a number of legal options are possible under national legislation, they still remain difficult (or theoretical) to apply in practice. Then it was time to consider to what extent EU measures and in particular the Proposal for a directive on credit services, credit purchasers and the recovery of collateral (COM(2018)135) would provide an answer to the problem of non-performing loans in Europe. The conclusion was that European measures displaced the problem without solving it!

The first day of the Congress ended with the festive evening which took place at the KWINT restaurant, where Prof. Dr. Bob Wessels delivered the keynote speech. Prof. Dr. Bob Wessels reminded the audience of the crucial role of insolvency practitioners to initiate best practices which can subsequently inspire their own legislation. It was important to remember that insolvency practitioners had powerful means to influence the future of national legislation as well as European regulation.

The second day of the Congress began with an update by Lucas Kortmann on the CJEU and other landmark decisions in European insolvency law. It was underlined that there was still some uncertainties in delimiting the frontier between civil/commercial and insolvency law. The CJEU cases discussed highlighted that everything finally depends on the origins of legal actions initiated and the impact of these actions on the creditors’ interests. Following this, a description of the ‘Niki saga’ led to debates within the audience on the crucial time to consider the opening of a proceeding as well as the on-going debatable concept of COMI. To conclude the session, Lucas Kortmann evoked the post-Brexit risk for EU insolvencies leading to a lack of automatic recognition in the particular situation where the debt is governed by English Law as the Rule in Gibbs states that an English Law debt cannot be discharged through foreign restructuring proceedings.

Creditor Protection in Austria on Preventive Restructuring Frameworks was then the topic developed by Dr. Hans-Georg Kantner. Indeed some measures included in the Directive proposal on preventive restructuring frameworks were discussed from an Austrian perspective. Dr. Hans-Georg Kantner first deplored the fact that the text gave the impression of expressing distrust towards the courts and how difficult it could be to protect new financing out-of-court. On the classes of creditors, Dr. Hans-Georg Kantner expressed concerns regarding the possible unfairness of such a system, given the uncertainties on how the Austrian courts could deal with conflicts which may arise in practice. Criticisms were also expressed on the uncertainties regarding concepts such as ‘*creditors best interest test’* and ‘*absolute priority rule’,* borrowed from the US and which might not fit with the idea of giving the owners of a distressed company a chance to be involved in the process of rescuing their business. Dr. Hans-Georg Kantner concluded his presentation by expressing his doubts on the success of the Directive proposal with regard to its main objectives (including the treatment of NPLs), while providing (only) a toolbox without a common view of what could be European (substantive) insolvency law.

After the coffee break, the participants were updated by Dr. Paul Omar on the cooperation and group insolvencies beyond the scope of the EIR. Dr. Paul Omar first reminded the audience of the current UK applicable tools to cross-border matters (namely the EIR, the UNCITRAL Model Law, section 426 of the Insolvency Act, judicial cooperation at Common Law and non-insolvency cooperation) as well as proceedings available in the UK (such as schemes, CVA, administration, liquidation, hybrid procedures and (possibly) preventive restructuring under the Directive proposal). Then post-Brexit scenarios from the integration of EU law into domestic legislation, the adoption of tailor-made arrangements to the adoption of existing European conventions or international treaties were discussed with the underlying problems linked to these options (question on CJEU oversight, the inter-governmental or EU legislation method and the problem of default private international law rules). Despite several available options, Dr. Paul Omar expressed the view that the situation will inevitably lead to a dramatic unprepared exit of the UK from the EU, while considering at the same time that the British experience had already influenced a number of legislations and practices all around the EU suggesting that the UK could finally remain on the playing field.

Before the closure of the Congress, Frank Tschentscher, Alexander Bornemann, David H. Conaway and Andrew Payne discussed how to create an attractive insolvency hub based on their experience in Germany, Singapore and the US. In particular, the audience was updated on the two bills currently pending before the US Congress, including one in relation to the location of the insolvency venue (place where the executive or principal assets in the last 6 months were located), though it was not considered sufficient to put an end to the forum shopping operating in the US. Then an update on the most important and recent changes in the law of insolvency of Singapore was made, namely new provisions on groups of companies, the inclusion of an automatic moratorium and a cram-down mechanism similar to the US Chapter 11 as well as provisions specific to recognition issues. Last but not least, it was mentioned that German legislation has made some progress on its restructuring options in the past ten years to make them more efficient while some issues remained due to the federal structure of the country. However, the well-known reputation of some German courts which were able to deal with very high sophisticated insolvency cases and the on-going German project to develop and establish specialised courts dedicated to deal with insolvency matters to supplement the current law applicable to German groups of companies were underlined.

Daniel Fritz closed the Congress underlying the fruitful debates which took place during the technical and networking sessions and invited the audience to meet again next year in Brussels.

More information about the Congress is available at:

<http://arge-insolvenzrecht.de/de/aktuelles>