



INTERNATIONAL INSOLVENCY INSTITUTE

Tenth Annual International Insolvency Conference

Rome, Italy

IF WE WERE DOING IT AGAIN: REFLECTIONS ON IMPROVING CHAPTER 11 AND CONTRASTING INTERNATIONAL EXPERIENCES

Restructuring Policy in Germany

By

Professor Christoph G. Paulus

Humboldt University
Berlin

June 7-8, 2010

Outline for Rome III Presentation

I. Legislative intents

Within the area of bankruptcy law, Germany had never developed a rescue culture.¹ The Composition Ordinance from 1935 was bound to fail right from its beginning due to a kind of built-in-failure-mechanism („composition-worthiness“; rather high minimum quota of 35 %).

In 1999 – admittedly after almost two decades of hot discussions – the insolvency Ordinance introduced a Germanized version of Chapter 11, the so called „plan proceeding“ (Planverfahren). Today, there is a wide-spread frustration that it has not – yet??? – gained more acceptance.

II. Particular differences

This makes one wonder what the reasons for this disappointing development might be – after all, the introduction of the plan proceeding was celebrated as the centre piece of the new Ordinance.

- Whereas Chapter 11 is a proceeding in itself, is the Planverfahren just a possible type of a uniform proceeding. I.e. you cannot apply particularly for a Planverfahren! The creditors will decide whether it is to be applied or not. And they decide not right at the beginning of the proceeding but

¹ This phenomenon could be (and to a certain degree still can be) observed almost all over the globe outside the US. The reason is likely to be a long lasting tradition. Be it noted that the consequence thereof has been the (economic and societal) luxury to expell people from business activities and public life because of their failure. It is to be assumed that the costs of such luxury has been more than once extremely high.

only several weeks (up to three months) after the commencement of the case.

- Therefore, a Planverfahren is applicable only when and if the general commencement criteria are given – in particular, the existence of an opening reason (i.e. insolvency or overindebtedness). In contrast, Chapter 11 does not have such requirement – and parallels for this very reason with the present considerations about introducing an out-of-court-procedure (see below at III).
- The overall purpose of the German insolvency Ordinance is the satisfaction of the creditors, s. 1 InsO – i.e. protection of the creditors – rather than protection from the creditors.
- The Planverfahren is complicated and allows non-complying creditors for obstructive interventions. Therefore, contrary to the obvious needs of an expedited proceeding for reorganizing the debtor the Planverfahren takes much to long time.
- The incentive of choosing Chapter 11 by remaining on board of the company is inexistent in the Planverfahren. The German equivalent to the debtor in possession, the „Eigenverwalter“, is admitted only – if at all (there is wide spread resentment against it) – after usually three months of a preliminary proceeding. This has a preliminary administrator but not a preliminary Eigenverwalter!
- The Planverfahren lacks harmonization with the general company law. Therefore, there are complicated interactions of competence between administrator and shareholders. In particular, to achieve a debt-equity-swap is extremely problematic and burdensome.

- There is no exclusivity period for the debtor to propose a plan. However, (as far as I know) creditors' proposals are fairly rare anyway.

III. As a consequence of the flopping Planverfahren – and because of the obvious attractiveness of other European out-of-court-procedures (such as the English CVA or the French Procédure de Sauvegarde or the Italian concordato preventivo) a pan-European competition for the best offer of such procedures has started; Germany is among the competitors but has not yet come up with a legislative solution (apart from a special proposal for the banking sector which is still discussed).

In this context, it is an interesting observation that the Chapter 11 proceeding covers the needs of both – by applying insolvency mechanisms before the debtor is in fact insolvent.